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IN THE
SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1913.

No. 502.

C. M. SUMMERS, PETITIONER,

vs.

THE UNITED STATES.

ON WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT
COURT OF APPEALS FOR THE NINTH CIRCUIT.

REPLY BRIEF FOR PETITIONER.

(All italics ours.)

Statement.

Defendant was indicted in the Territory of Alaska under Sec. 5209, Revised Statutes, providing a penalty for violation of the National Banking Laws. The indictment contained 56 counts.

The indictment was demurred to, for that it charged more than one crime. The demurrer was overruled.

An Alaskan statute passed by Congress for the Territory, March 3, 1899, provides:

"That if the demurrer be disallowed the court must permit the defendant at his election to plead, which he must do forthwith, or at such time as the court may allow; but if he do not plead, judgment must be given against him."

Defendant elected to stand on his demurrer, and was forthwith found guilty by the court, without a trial or the intervention of a jury, on each of the 56 counts, and thereupon sentenced to serve a term of five years in the Federal penitentiary at McNeil's Island, on each count, the time to run concurrently and the entire sentence to be completed upon the service of five years.

This judgment was affirmed by the Circuit Court of Appeals for the Ninth Circuit on writ of error, and this court granted certiorari.

ARGUMENT.

Three points are involved:

I. *When a territorial court is exercising the jurisdiction of a district court of the United States, does the local procedure of the Territory or that prescribed by the Revised Statutes for circuit and district courts of the United States apply?*

II. *Will an indictment invalid on demurrer, for that it charges more than one crime, become valid through a change in the statute law made subsequent to the filing of the demurrer?*

III. *Is an act of Congress passed for the Territory of Alaska, under the terms of which a defendant in a criminal case, after demurrer overruled, may waive both jury and trial and receive sentence without a plea of guilty, valid?*

I.

An examination of the first point involves the consideration of:

- a. The law prior to the act of March 3, 1899.
- b. The operative effect of the act of March 3, 1899.
- c. The error, if any, in the reasoning of the lower courts.
- d. The cases and reasoning relied upon by respondent.

a.

The Law as it Stood Prior to the Act of 1899, Providing a Code of Criminal Procedure for the Territory.

By the act of May 17, 1884, 23 Stats., 24, providing a civil government for Alaska, it was, among other things, provided:

"That the general laws of the State of Oregon now in force are hereby declared to be the law in said District, so far as the same may be applicable, and not in conflict with the provisions of this act or the laws of the United States."

At that time an act of Oregon, approved October 19, 1864, provided:

"That the indictment must charge but one crime and in one form only."

At the same time (1884), section 1024 of the Revised Statutes provided:

"SEC. 1024. When there are several charges against any person for the same act or transaction, or for two or more acts or transactions connected together, or for two or more acts or transactions of the same class of crimes or offenses, which may be properly joined, instead of having several indictments, the whole may be joined in one indictment in separate counts; and if two or more indictments are found in such cases the court may order them to be consolidated."

Thus stood the statute law upon the subject prior to the act of March 3, 1899.

As to the law prior to *March 3, 1899*, there can be no controversy. The rule has been so frequently announced by this court as to admit of no argument.

Alaska was and is an organized Territory.

The Coquitlam v. U. S., 178 U. S., 346.

Biss vs. U. S., 194 U. S., 486.

Rasmussen vs. United States, 197 U. S., 516.

Interstate Commerce Commission vs. U. S., 224 U. S., 474.

In the territories the local procedure obtains; not that provided for in general laws of the United States for district and circuit courts.

This question first arose in 1871 in

Clinton vs. Englebrecht, 13 Wall., 434.

A petit jury was impaneled as provided by the laws of the United States, and not in accordance with the law of the Territory of Utah. The same argument was then pressed upon the court as is now advanced by the Government, *i. e.*, the enabling act of Utah, providing,—

“That the Constitution *and laws* of the United States are hereby extended over and declared to be in force in said Territory of Utah, so far as the same or any provision thereof may be applicable,”—

and the district court of the Territory being clothed with the same jurisdiction as the district court of Alaska, that is, with not only local territorial jurisdiction, but also that of district and circuit courts of the United States, it was insisted that the local law with reference to the impaneling of juries being in conflict with the general law of the United States, the former must yield and the latter prevail, but this court said:

"Acting upon the theory that the supreme and district courts of the Territory were courts of the United States, and that they were governed in the selection of jurors by the acts of Congress, the district court summoned the jury in this case by open venire, *we are of opinion that the court erred in its theory and in its action.*

"The judges of the Supreme Court of the Territory are appointed by the President under an act of Congress, but this does not make the courts they are authorized to hold courts of the United States. This was decided long since in the American Insurance Company *vs.* Canter, and in the later case of Benner *vs.* Porter."

A similar question next arose in 1873 in
Hornbuckle vs. Toombs, 18 Wall., 648.

A statute of the United States, commonly known as the process act of 1792, 1 Stat., 276, provided for the separation of legal and equitable causes of action in the courts of the United States, a statute of the Territory of Montana for their commingling. The organic act clothed the territorial courts with the jurisdiction of circuit and district courts of the United States, and prohibited the passage of any laws in conflict with the Constitution *and laws* of the United States. The same argument advanced in the Clinton case, *supra*, and reiterated here, was again urged, but the court said, p. 654:

"A clause in the thirteenth section of the act, however, has been referred to, by which it is declared 'That the Constitution, and all laws of the United States which are not locally inapplicable, shall have the same force and effect within the said Territory of Montana as elsewhere in the United States;' and it is argued that by virtue of this enactment, all regulations respecting judicial proceedings which are contained in any of the acts of Congress, *are imported into the practice of the territorial courts.* But this proposition is not tenable. Laws regulating the proceedings of the United States courts are of specific

application, and are, in truth and in fact, *locally inapplicable to the courts of a Territory.*

"The acts of Congress respecting proceedings in the United States courts are concerned with, and *confined to*, those courts considered as parts of the Federal system and as invested with the judicial the Constitution, and to be exercised in correlation with the presence and jurisdiction of the several State courts and governments. They were not intended as exertions of that plenary municipal authority which Congress has over the District of Columbia and the Territories of the United States. They do not contain a word to indicate any such intent. The fact that they require the circuit and district courts to follow the practice of the respective State courts in cases at law, and that they supply no other rule in such cases, shows that they cannot apply to the territorial courts. As before said, these acts have specific application to the courts of the United States, which are courts of a peculiar character and jurisdiction.

"As a general thing, subject to the general scheme of local government chalked out by the organic act, and such special provisions as are contained therein, the local legislature has been intrusted with the enactment of the entire system of municipal law, subject, also, however, to the right of Congress to revise, alter, and revoke at its discretion." * * *

"From a review of the entire past legislation of Congress on the subject under consideration our conclusion is, that the *practice, pleadings, and forms and modes of proceeding* of the territorial courts, as well as their respective jurisdictions, subject, as before said, to a few express or implied conditions in the organic act itself, were intended to be left to the legislative action of the territorial assemblies, and to the regulations which might be adopted by the courts themselves."

The point next arose in 1877 in
Good vs. Martin, 95 U. S., 90.

A general law of the United States, 13 Stats., 351, provided that no person should be excluded from testifying in

a court of the United States because of interest. A territorial law of Colorado provided the contrary. The question was, Which should prevail? The court said:

Territorial courts are not courts of the United States, within the meaning of the Constitution, as appears by all the authorities. *Clinton et al. vs. Englebrecht*, 13 Wall., 434; *Hornbuckle vs. Toombs*, 18 Wall., 648. A witness in civil cases cannot be excluded in the courts of the United States because he or she is a party to, or interested in, the issue tried, but the provision *has no application in the courts of a Territory* where a different rule prevails.

The point next arose in 1878 in
Reynolds vs. U. S., 98 U. S., 145.

This was a prosecution for bigamy under R. S., 5352. The court, as in the case at bar, was exercising the jurisdiction of a *district court of the United States*. The question was as to the mode of impaneling the grand jury, whether under R. S., 808, or according to the territorial law. The court said:

"Sec. 808, Revised Statutes, requires that a grand jury impaneled before any district or circuit court of the United States shall consist of not less than sixteen nor more than twenty-three persons, while a statute of the Territory limits the number in the district courts of the Territory to fifteen. Comp. Laws, Utah, 1876, 357. The grand jury which found this indictment consisted of only fifteen persons, and the question to be determined is, *whether the section of the Revised Statutes referred to or the statutes of the Territory governs the case.*

"By sec. 1910 of the Revised Statutes the district courts of the Territory have the same jurisdiction in all cases arising under the Constitution and laws of the United States; *but this does not make them circuit and district courts of the United States.*

"Sec. 808 was not designed to regulate the impaneling of grand juries in all courts where offenders against the laws of the United States could be tried,

but only in the circuit and district courts. This leaves the territorial courts free to act in obedience to the requirements of the territorial laws in force for the time being. *Clinton vs. Englebrecht, supra; Hornbuckle vs. Toombs*, 18 Wall., 648."

The question twice arose in 1880, first in *Page vs. Burnstine*, 102 U. S., 664.

Here the question was as to the applicability to the District of Columbia of R. S., 858, prohibiting any testimony in suits by or against an executor, by either of the parties thereto, as to transactions with or statements of the decedent. The section was held applicable, not because of any conflict between the laws of the United States and those of the District of Columbia, but, on the contrary, because it was found from the history of the section itself that it was the *intention of Congress that it apply to the District*.

That it was not intended to modify the rule theretofore announced is most apparent. The court said:

"These views do not at all conflict with the previous decisions of this court, holding that certain provisions of the General Statutes of the United States relating to the practice and proceedings in the 'courts of the United States' are locally inapplicable to territorial courts. Those decisions, it will be seen, proceeded upon the ground, mainly, that the legislatures of the Territories referred to, in the exercise of power expressly conferred by Congress, had enacted laws covering the same subjects as those to which the General Statutes of the United States referred. It was therefore ruled that the territorial enactments, regulating the practice and proceedings of territorial courts, were not displaced or superseded by general statutes upon the same subject passed by Congress in reference to 'courts of the United States.' *Clinton vs. Englebrecht*, 13 Wall., 434; *Hornbuckle vs. Toombs*, 18 *Id.*, 646; *Good vs. Martin*, 95 U. S., 90."

And secondly in *Miles vs. U. S.*, 103 U. S., 305.

This, like the Reynolds case, was a prosecution under R. S., 5352, for bigamy. The territorial court, as in the case at bar, was exercising the *jurisdiction of a district court of the United States*. The question presented was as to the manner of trying a juror on a challenge for actual bias. The court said:

"In impaneling the jury the court was bound to follow *the law of the Territory* on that subject. *Clinton vs. Englebrecht*, 13 Wall., 434; *Reynolds vs. United States*, 98 U. S., 145."

The point next arose in 1885 in
Theide vs. Utah, 159 U. S., 515.

This was a prosecution for murder. R. S., 1033, provided that the defendant in a capital case was entitled to have delivered to him at least two days before the trial a copy of the indictment and a list of the witnesses to be produced at the trial. The question presented was whether this section was applicable. The court said:

"But this section applies to the circuit and district courts of the United States, and does not control the practice and procedure of the courts of Utah, *which are regulated by the statutes of that Territory*."

Finally, the precise question came to this court in 1899 from the *Territory of Alaska*, in
Fitzpatrick vs. U. S., 178 U. S., 306.

That was a prosecution under a *general law of the United States*, R. S., 5339. The trial court was exercising the jurisdiction of a *district court of the United States*, as distinguished from that of a territorial court. The question presented was as to the *sufficiency of the indictment*.

By what law was it construed?

The court said:

"By section seven of an act providing a civil government for Alaska, approved May 17, 1884, c. 53,

23 Stat., 24, it is enacted 'that the general laws of the State of Oregon now in force are hereby declared to be the law in said district, so far as the same may be applicable and not in conflict with the provisions of this act or the laws of the United States.' *We are, therefore, to look to the law of Oregon and the interpretation put thereon by the highest court of that State, as they stood on the day this act was passed, for the requisites for an indictment for murder rather than to the rules of the common law.'*

The whole learning upon the subject was reviewed as late as 1906 by *Mr. Justice Van Devanter*, then circuit judge, speaking for the Circuit Court of Appeals for the Eighth Circuit in

Cochran vs. U. S., 147 Fed., 206.

That was a prosecution under R. S. 2145, and the trial court "*was exercising the jurisdiction of the circuit and district courts of the United States.*" The question arose on the right of the defendants to separate trials and the number of peremptory challenges to which they were entitled. Should the Revised Statutes of the United States or the Territorial law apply? The court said:

"It is important, therefore, to inquire whether the territorial district court, *when exercising the jurisdiction of the circuit and district courts of the United States in the trial of an offense against the laws of the United States*, should conform to the practice and modes of proceeding in the circuit and district courts of the United States or to those prescribed by the territorial statutes. The question is not new, and the answer to it is found in repeated decisions of the Supreme Court of the United States. *Reynolds vs. United States*, 98 U. S., 145, 154; 25 L. Ed., 244; *Miles vs. United States*, 103 U. S., 304, 310; 26 L. Ed., 659; *Hornbuckle vs. Toombs*, 18 Wall., 648; 21 L. Ed., 966; *Good vs. Martin*, 95 U. S., 90, 98; 24 L. Ed., 341.

"These decisions hold that the territorial courts, although expressly clothed with the same jurisdiction

in all cases arising under the Constitution and laws of the United States as is vested in the circuit and district courts of the United States, are not courts of the United States, but legislative courts of the territories; *that the practice and modes of proceeding including that of impaneling juries, prescribed for the courts of the United States, have no application to them, and that they are bound to conform to the territorial laws upon these subjects where it is not otherwise specially provided by some law of the United States.*"

The precise point now presented has been four times decided adversely to the contention of the Government by the Circuit Court of Appeals for the Ninth Circuit. In

Endleman vs. U. S. (1898), 86 Fed., 456,

a prosecution for the illegal sale of liquors, there was a demurrer to the indictment for that it charged *more than one crime*, and the question was determined *by the law of Oregon*. In

Jackson vs. U. S. (1900), 102 Fed., 473,

there was a prosecution for assault with a dangerous weapon. There were a number of objections to the indictment. Its sufficiency was in each respect determined by *the law of Oregon*. There was an objection to a grand juror for actual bias. Its validity was decided by the *law of Oregon*. The court said:

"We are of the opinion that this action of the court was not erroneous. The procedure relative to summoning and impaneling grand jurors is often expressly provided for by statute. In such cases the courts substantially conform to such procedure. In *Reynolds vs. U. S.*, 98 U. S., 145, the court held that section 808 R. S., provided for impaneling grand juries, applies only to the circuit and district courts of the United States and that the laws of the territory govern and control the impaneling of a grand jury."

In 1902 the same question arose in
Corbus vs. Leonhardt, 114 Fed., 10.

holding that R. S. 858, providing that in actions by or against executors, etc., no party shall be allowed to testify against the other, etc., had no application to territorial courts.

Finally, in 1906, the point arose in
Ball vs. U. S., 147 Fed., 32.

Here it was held that in a prosecution for murder, the requirements of R. S. 1033 as to furnishing the accused with a list of witnesses had no application to the Territory of Alaska.

Such, then, was the law prior to the act of March 3, 1899, providing a code of criminal procedure, for the District of Alaska.

b.

The Operative Effect of the Act of March 3, 1899.

The question now is: Did Congress, by the legislation of 1899, intend to repeal the law with reference to the charging of more than one crime in an indictment, as it had theretofore stood since 1884, substituting in lieu thereof the practice provided for in R. S. 1024?

No such intention can be found in the act itself.

The title of that act, 30 Stat., is:

"An act to define and punish crimes in the District of Alaska and to provide a code of criminal procedure for said district."

The enacting clause is:

"That the penal and criminal laws of the United States and the procedure thereunder relating to the District of Alaska shall be as follows:"

It will be observed that no differentiation is made between the procedure in case of the infraction of laws peculiar to the Territory itself, and that to obtain under a general law applicable to Alaska, as well as other portions of the United States.

The meaning is that the procedure is to be the same in both events.

"The penal and criminal laws of the United States of America," *not the penal and criminal laws of the United States of America applicable only to Alaska*, and the "procedure thereunder relating to the District of Alaska shall be as follows."

That is to say, that the procedure under all penal and criminal laws of the United States of America, *whether they be local or general*, if only they apply to Alaska, shall be as set forth.

How can it be said that there is here expressed any intention to adopt a dual system of procedure—in the one case that prescribed in the act itself, and in the other that provided for in the Revised Statutes.

The act is in two titles. Title I defines certain crimes against the Territory. Title II provides the procedure.

Section 1 of title II provides,

"That proceedings for the punishment and prevention of the crimes defined in title I of this act shall be conducted in the manner herein provided."

Section 43, title II, provides,

"That the indictment must charge but one crime, and in one form only, except that where the crime may be committed by the use of different means, the indictment may allege the means in the alternative."

Where is there here manifest any intention to adopt a dual system of procedure?

If it be true, as contended, that the apparent limitation contained in Sec. 1 of title II is such as to make Sec. 43 applicable only to the crimes defined in title I, does it *necessarily follow* that this indicates an intention to make some other procedure applicable to crimes not defined in title I?

Is it not more reasonable to presume that the apparent limitation was a mere oversight, that section 1 of title II was in the nature of an introductory preamble, and that the real intention was as specifically expressed in the enacting clause, rather than to assume an intention to completely abandon the prior law and adopt a wholly *new, different, and dual* procedure?

That construction should be adopted which is in and of itself the more reasonable.

To hold that the apparent limitation contained in section 1, title II, was intentional, would violate many proper canons of construction. It would be in direct conflict with the enacting clause.

It would conflict with section 13

"that the grand jury have power, and it is their duty to inquire into all crimes committed or triable within the jurisdiction of the court, and present them to the court either by presentment or indictment, as provided in this act."

Here is a grant of power to the grand jury to inquire into *all crimes*, and not merely those enumerated in title I.

It would be in conflict with the latter portion of section 10, title II, providing:

"the true intent and meaning of this section being that but one grand jury shall be summoned in each division of the court to inquire into all offenses committed or triable within said district, as well those that are designated in title one of this act *as those that are defined in other laws of the United States.*"

For the power is here granted in terms to inquire into all offenses "as well as to those that are designated in title I of this act as those that are defined in other laws of the United States."

It would violate the presumption against implied repeals.

It would violate the rule requiring a statute to be considered as a whole in determining the meaning of a part.

It would violate the construction of the act by its author, the late Senator Carter, who, in his introduction to the Alaska code, said with reference to the acts of March 3, 1899, and June 6, 1900, making further provision for a civil government:

"The two acts last named embrace a criminal code, a code of criminal procedure, a political code, a code of civil procedure, a civil code and certain license taxes for the District."

"The codes were mainly copied from the statutes of the State of Oregon, and to the end that adjudications by the Supreme Court of that State might remain *as directly in point as possible*, changes were sparingly made in the text of sections."

It would violate the construction which other departments of the Government have placed upon the law.

Section 1024, R. S., came from the act of February 26, 1853. Congress never placed upon the act the construction now contended for, or believed it applicable to the territories; for a portion of the act was specifically extended to the Territories of Minnesota, New Mexico, and Utah (10 Stats., 671) in 1855. Again, in 1882, it was extended to the Territories of New Mexico and Arizona.

Had the act by its own operative force extended to the Territories, such legislation would have been unnecessary.

And more, it is significant that in the extension of the act to these particular Territories only a portion was so extended. That part which afterwards became section 1024, R. S., was *not* made applicable.

So, on the adoption of the "New Penal Code" (35 Stats., 1088) March 4, 1909, Congress, in extending certain crimes to the Territories, provided specifically in section 315:

"Counts for any or all of the offenses named in the two sections last preceding may be joined in the same information or indictment."

Obviously, if section 1024 did apply to the Territories as here contended, such legislation was useless.

So the territorial legislature of Alaska, as set forth in respondent's brief on April 26, 1913, passed an act amending section 43 of the act of criminal procedure so as to make it correspond with section 1024 of the Revised Statutes, this clearly indicating their opinion *that the law could not be as here contended for without the aid of statutory enactments.*

Since the point has been raised in the case at bar, the Department of Justice in the conduct of its business in Alaska itself made a *practical construction* of the law as here contended for by the petitioner, and in the Government's brief filed in this very case, when pending on writ of error to the Circuit Court of Appeals for the Ninth Circuit, it was said on page 202:

"Since this question was seriously raised, the United States Attorney's office at Juneau has had to be excused from prosecuting two cases under the white slave traffic act because success seemed impossible without *joining two or more counts in the same indictment*, and the cases had to be brought in Washington as a consequence."

But assuming the apparent limitation contained in section 1 of title II intentional and deliberate, what is the effect? Does it not leave the law in the same status in which it existed from 1884 to the time of the passage of the act of 1899?

If, by the act of 1899, the procedure thereunder specified is limited to the crimes defined in title I, does it not necessarily follow that the procedure for crimes *not* set out in part one remains the same as it existed prior thereto?

Can it, with any show of reason, be said that a limitation of the procedure set forth in the act to the crimes defined therein in and of itself operates as a repeal of the prior law with reference to the procedure in offenses not set forth therein?

If, as claimed, the language employed in section 1, title II, is in fact a limitation of the procedure to the offenses defined in title I, is not the procedure for other offenses not so defined just as it was prior to the act of 1899—that is to say, as it was *under the law of Oregon?*

c.

Error in the Reasoning of the Lower Courts.

The opinion of the trial court in the so-called "Transportation Cases," which was rendered just prior to the decision in the case at bar, and was therefore controlling, is printed as an appendix to respondent's brief, and to that the court's attention is now invited.

The learned court below, after admitting that the point was not without difficulty, proceeded to find that the court had a *dual jurisdiction*.

It was next found that by reason of the language employed in section 1 of title II the procedure provided for in the act of 1899 was limited in its operative effect to the crimes defined in title I, and therefore that such procedure had no application to crimes not so defined.

Concluding from this that this whole class of crimes must be prosecuted under some other and different procedure, the court proceeded to discover, if possible, what it was.

Finding that section 10 provided that:

"grand juries to inquire of the crimes designated in title I of this act, committed or triable within said district, shall be selected and summoned and their proceedings shall be conducted in the manner pre-

scribed by the laws of the United States with respect to grand juries of the United States district and circuit courts,"

and further finding that this provision conflicted with chapter 5 of title II, dealing with the proceedings of grand jurors in a manner substantially the same, but in some respects perhaps different from those prescribed by the Revised Statutes, the court arrived at the conclusion:

"It is apparent that the framers of section 10 had in mind dual procedure for the District Court for the District of Alaska in the prosecution of crimes, because the code of criminal procedure prescribes a procedure which governs grand juries while they are investigating local or territorial crimes, but section 10 provides that the grand juries shall be governed by the rules of proceedings prescribed by the laws of the United States with respect to grand juries of the United States district and circuit courts."

In other words, because section 10 provided that grand juries in their investigation of crimes set forth in title I should be governed in their proceedings by the general laws of the United States and because this provision apparently conflicted with other sections of the same act; therefore *a dual system of procedure was adopted, not only as to the proceedings of grand juries, but as to the form and substance of the indictment and the whole progress of the trial.*

We insist that no such conclusion legitimately or at all flows from the premise, but on the contrary, respectfully submit, that a moment's consideration will disclose that all that was meant by section 10 was that the laws of the United States, etc., should apply in the proceedings of grand juries when there was no local procedure to the contrary.

Given this reasonable, and we respectfully suggest, plain and common sense interpretation, *the section readily harmonizes itself with the other provisions of the act.*

Even if there were a conflict, irreconcilable, between the provisions of section 10 and those of other sections of the

act, is this conflict to be reconciled by admitting a dual system of procedure, *not only as to the proceedings of the grand jury, but as to the form and substance of the indictment as well as the conduct of the trial*, when no intention on the part of Congress so to do appears otherwise than by reason of the *apparent conflict*.

The error of the court lay in assuming because of this apparent conflict as to the manner of conducting the proceedings of the grand jury that it was the intention of Congress to impose upon Alaska a dual system of procedure, both as to the form and substance of the indictment and as to the rules affecting the conduct of the trial.

The court next justified its ruling on the ground that because—

1. It had a dual jurisdiction, and
2. R. S., 1891, extended to the Territories the Constitution and laws of the United States not locally inapplicable,

"the provisions of the general statutes of the United States governing the procedure in the Federal courts,"

were applicable to the Territory.

But it will be observed that *this is in the very teeth of the repeated decisions of this court. Cited supra.*

The court also said:

"The Alaska cases cited by counsel which have been passed on by our Appellate Court deal with questions of procedure in the prosecution of violations of the local law."

The Court had entirely overlooked
Fitzpatrick vs. U. S., supra,

which was a prosecution under section 5339, R. S., where the District Court for the District of Alaska *was exercising the jurisdiction of a district court of the United States as dis-*

tinguished from that of a territorial court, as well as the cases of

Reynolds vs. U. S., supra,

and

Miles vs. U. S., supra,

in each of which a similar condition prevailed.

Finally the court justified its ruling on the ground that inasmuch as it *was* clothed with a dual jurisdiction, it *ought* to be furnished with the same rules of procedure, "which the light of experience has proved to be adequate and satisfactory in the prosecution of offenses of the character charged in the indictment."

In answer to this, we respectfully submit, *it is a question for Congress, not the court.*

The Circuit Court of Appeals for the Ninth Circuit rested its judgment upon precisely the same reasoning set forth in the opinion of the trial court, and upon the further ground

"but aside from the intention of Congress as expressed in the acts specifically relating to Alaska, which we have just considered, there is no substantial reason here why that clause in the act of February 26, 1853, which became section 1024 of the Revised Statutes, does not now apply to all Territorial courts, as well as to the circuit and district courts of the United States in all cases of offenses against the laws of the United States."

We respectfully suggest that the "substantial reason" is because this court, through a long line of decisions, beginning in 1871 with

Clinton vs. Englebrecht

and ending in 1899 with

Fitzpatrick vs. U. S.,

had held the exact contrary.

Either the general laws governing the procedure of the district and circuit courts of the United States apply in the Territories or they do not. This court has said they do not.

The unspeakable situation which would arise if certain laws of procedure were held to apply and others not needs no comment. Neither the practitioner nor the court would be able to say with any degree of certainty at any stage of any proceeding what particular rule applied until each in turn had been passed upon by the appellate courts.

The proposition that even assuming the language of section 1 of title II of the act of 1899 limited the procedure therein set forth to the offenses defined in title I, the law prohibiting the charging of more than one crime in an indictment nevertheless remained as between 1884, and the passage of the act of 1899 was not adverted to in the decision of either of the lower courts.

d.

The Reasoning and Cases Relied upon Here.

Coming to the reasoning and cases relied upon by respondent to sustain its position in this court, it is said:

The alleged error was immaterial because:

a. "Petitioner received no greater sentence than must have been imposed on a conviction of one crime only."

b. "Prejudice cannot be shown because the error might have been cured had petitioner gone to trial."

c. "The error was one of form cured by section 1025, R. S."

The time of the court will not be occupied in serious discussions of these positions.

If sound, the positive, substantive provisions of the law of Oregon made applicable to Alaska by the act of 1884, and since re-enacted by that of March 3, 1899—

"That the indictment must charge but one crime and in one form only."

"That the defendant may demur to the indictment when it appears upon the face thereof that more than one crime is charged in the indictment,"—

means simply nothing. Such a view would make of the statutory law upon the subject, a cruel but humorous satire.

The petitioner will not be denied a trial according to the law of the land, because he received only the *minimum sentence*, or because he *might* have been acquitted had he introduced testimony, or because the district attorney *might* have dismissed the indictment, or *might* have been compelled to elect to stand on one count.

It is next said:

"The practice in this case is governed by section 1024 of the Revised Statutes of the United States, and not by section 43 of the Alaska Code,"

because:

"1. The penal and criminal procedure codes apply only to the crimes therein mentioned, and not to crimes defined in the Revised Statutes or other general laws of the United States."

This position was fully examined in the discussion of the opinions of the lower courts. No argument new or different from that therein contained is here advanced by respondent.

"2. The general laws of the United States not locally inapplicable are in force in Alaska."

This may be admitted arguendo. It proves nothing. As pointed out, inasmuch as *either* section 43, title II, of the act of 1899, *or* the law of Oregon as it stood from the passage of the act of 1884 to March 3, 1899, covered the precise question of procedure, section 1024 was *locally inapplicable*. As expressly said in

Hornbuckle vs. Toombs, supra:

"Laws regulating the proceedings of the United States courts are of specific application, and are in

truth and in fact locally inapplicable to the courts of the Territory."

To support this contention for a dual system of procedure in Alaska, respondent says in effect: Congress did not confer this dual jurisdiction without providing a procedure; that specified in the act of 1899 does not apply; therefore the Federal procedure *necessarily* governs prosecution of Federal offenses.

Why not the procedure which existed in the Territory prior to the passage of the act of 1899? How respondent arrived at the conclusion that

Reynolds vs. U. S.,

Miles vs. U. S.,

and

Fitzpatrick vs. U. S. (supra)

were prosecutions for a *local crime* is not observed. It fully appears in the decision in each case that they were prosecutions under sections of the Revised Statutes, and the court in conducting the trials was *exercising the jurisdiction of a district court of the United States*, and not that of a territorial court.

Cochran vs. U. S., 147 Fed., 206,

decided by the Circuit Court of Appeals for the Eighth Circuit as late as 1906, in which the whole learning upon the subject is reviewed, has not been adverted to by respondent.

The cases relied upon by respondent are somewhat wide of the mark.

Because in

United States vs. Pacific and Arctic Co., 228 U. S., 87,

this court refused to dismiss a writ of error brought by the United States to review a judgment of the District Court of Alaska, and because it was held in

Hyde vs. Shine, 199 U. S., 62,

that the District of Columbia is a district of the United

States within section 1014, R. S., authorizing the removal from one district to another of persons charged with crime, it does not follow that section 1024, R. S., governs the procedure in Alaska.

It is true that in

Hornbuckle vs. Toombs (supra),

the precise question here presented was reserved; but, as pointed out, it was later decided in the four cases—

Reynolds vs. United States,

Miles vs. United States,

Fitzpatrick vs. United States,

Cochran vs. United States (all supra)—

adversely to the contention of respondent.

It is true that in

Keys vs. United States, 27 Fed., 351,

Judge Deady held that the grand jury should be summoned and drawn in accordance with the provisions of the Revised Statutes of the United States.

But this was because, inasmuch as there was *no county organization in Alaska*, the laws of Oregon upon that subject were inapplicable, and the court said:

"The following sections of the Code providing for the selection of jurors and the formation of the jury list by the county court from the assessment roll, are, of course, *inapplicable, as there are no county courts nor assessment rolls in Alaska.*"

Where the Oregon law *was applicable*, however, it was sustained, and in determining the qualifications of the jurors Judge Deady said:

"But the question as to who is qualified to serve as a juror in the district court of Alaska must be answered *by the law of Oregon.*"

II.

Will an indictment invalid on demurrer for that it charges more than one crime become valid through a change in the statute law made subsequent to the filing of the demurrer?

It is contended that because of the act of the territorial legislature of Alaska of April 26, 1913, printed as an appendix to respondent's brief herein, so amending section 32, title II, of the act of March 3, 1899, as to make it conform to the provisions of section 1024, R. S., this case cannot be reversed upon the point of practice herein raised, for that the decision must be in accordance with the law *now* in force and not that applicable at the time of the ruling of the court on the demurrer.

Respondent's argument is predicated upon the assumption that no change in mere procedure renders a law *ex post facto*. *This is a mistake.* There are many changes in procedure, or the character or quantity of evidence, which may become as objectionable as *ex post facto* laws as one of substantive import; in fact, many laws of procedure *become substantive*.

What the result of this territorial law might have been if passed after the alleged commission of the crimes charged, but before indictment, or even after indictment, but before demurrer interposed, need not be here decided. It may be admitted by way of argument that under either of these circumstances its operative effect would not have been *ex post facto*.

When, however, the indictment had been found, and a proper demurrer duly interposed, defendant acquired the right to have his decision upon his demurrer according to the law as it then was. *He acquired a vested right in that law of procedure as it then stood.* Any future change would, in its operative effect, be *ex post facto* as to him.

Any change in the law, whether relating to pleadings, evidence, or practice, which so operates as to affect a substantial right of the defendant adversely to his interests is to him ex post facto.

It would indeed be an anomaly if, assuming the defendant innocent and his point on demurrer well taken, he should be now rewarded for standing on his rights by a term of five years in the penitentiary because, forsooth, *the legislature has changed the law pending his appeal!*

In asserting and standing firmly upon their rights resisting the aggressions of Government defendants are not required to gamble, as suggested in respondent's brief, upon the possibility of the law being *changed to their disadvantage* pending the determination of their writ of error or appeal.

Consider petitioner's position. He believed his point well taken under the repeated decisions of this court, the Circuit Court of Appeals for the Eighth Circuit, as well as that for the Ninth. His opinion was not *wholly* unwarranted in law. He elected to stand on his demurrer; otherwise he might have again interposed his plea of not guilty, and put himself on his country.

Under these circumstances, surely he acquired a substantive legal right to have his demurrer adjudged according to the law of the land. Would not any subsequent change in the law validating that which at the time of his demurrer was *confessedly invalid* operate injuriously on the right which he thus acquired?

If so, then no error, no matter how *flagrant* or arbitrary, so long as it referred merely to procedure, pleading, evidence, practice, would be reversed, provided only the legislature cured the defect pending appeal.

Nor is the position maintained in any judicial utterance of which we are aware. As to the civil cases cited, they are not even analogous.

Neither is it necessary to examine in detail the criminal cases cited, for in none of them did the law involved operate

in, the slightest degree against any substantial right of defendant, and in no case had he secured any such *vested right* in the particular law or pleading, practice, or evidence as in the case at bar.

It is not here contended that the legislature may not alter the law on a mere question of pleading or practice *after the offense and before trial*. All that is urged is that this alteration cannot occur after trial when the right of the defendant to have his case adjudged according to the law of the land has fully and in all respects *attached*.

For cases more closely in point than those cited by respondent, the attention of the court is invited to

Kring vs. U. S., 107 U. S., 221.

This was a prosecution for murder. By the law of Missouri at the time of the homicide a conviction of murder in the second degree was an acquittal of the crime in the first, but before defendant entered his plea the law was changed so that by force of its provision if a judgment on that plea be lawfully set aside it would not be held to be an acquittal of the higher crime.

A judgment against him on a plea of guilty to murder in the second degree was reversed and on a new trial he was convicted of murder in the first degree.

It was held (the Chief Justice, Mr. Justices Matthews, Bradley and Gray dissenting) that the change in the law after the commission of the offense charged and before the entry of the plea was in its operative effect on the defendant in that case *ex post facto*.

And while the court differed on the application of the rule to the facts of that particular case, there was no controversy as to the principle involved or the correct statement of the rule, for it was said by the majority:

"But it cannot be sustained without destroying the value of the constitutional provision, that a law, however it may invade or modify the rights of a party charged with crimes, is not an *ex post facto*

law, if it comes within either of these comprehensive branches of the law designated as pleading, practice and evidence.

"Can the law with regard to appeals, to indictments, to grand juries, to the trial jury, all be changed to the disadvantage of the prisoner by State legislation after the offense was committed, and such legislation not held to be *ex post facto* because it relates to procedure, as it does according to Mr. Bishop?

"And can a substantial right which the law gave the defendant at the time to which his guilt relates be taken away from him by an *ex post facto* legislation, because, in the use of a modern phrase, it is called a law of procedure? We think it cannot."

And the minority said:

"There are doubtless many matters of mere procedure which are of vital consequence, but in respect to them, the power of Congress as to crimes against the United States is restrained by positive and specific limitations. * * *

"But in addition to these matters of procedure which are specially protected against legislative change, either for the past or the future, there may be others in which changes with a retrospective effect are forbidden by the prohibition against *ex post facto* laws.

"Every case must be decided upon its own circumstances, as the question continually arises and requires an answer; but it is a familiar principle that before rights derived under public laws have become vested in particular individuals the State, for its own convenience and the public good, may amend or repeal the law without just cause of complaint.

"In respect to criminal offenses, it is undoubtedly a maxim of natural justice embodied in constitutional provisions that the quality and consequence of an act shall be determined by the law in force when it is committed. * * *

"But matters of possible defense which accrue under provisions of positive laws, which are arbitrary and technical, introduced by public convenience, or for

motives of policy, which do not affect the substance of the accusation or defense, and form no part of the *res gestæ*, are continually subject to the legislative will, unless, in the meantime, by an actual application to the particular case, the legal condition of the accused has been actually changed. *His right to maintain that status, when it has become once vested, is beyond the reach of subsequent law."*

The court will not fail to observe that this is all that is claimed in the case at bar. It is not urged that petitioner had any vested right to have the practice remain after the commission of the offense and before trial, as it had been theretofore.

But it is insisted that after trial and

"by an actual application to the particular case, the legal condition of the accused has been actually changed. His right to maintain that status, when it has become once vested, is beyond the reach of subsequent law."

Also to the case of

Thompson vs. Utah, 170 U. S., 351,

where it was held (Mr. Justice Brewer and Mr. Justice Peckham dissenting) that the provision in the constitution of the State of Utah providing for the trial of criminal cases, not capital, in courts of general jurisdiction by a jury composed of eight persons, is *ex post facto* in its application to felonies committed before the Territory became a State.

But should the court sustain the position of respondent with reference to its contention that the language employed in section 1, title II, of the act of 1899 limited the procedure therein specified to crimes defined in title I, then it is submitted that the act of April 26, 1913, of the Territorial Legislature is not in point and applies only to offenses defined in title I, and that any question in the case at bar being not so defined is under the Oregon rule in force prior to the act of March 3, 1899.

III.

Is an act of Congress passed for the Territory of Alaska under the terms of which a defendant in a criminal case, after demurrer overruled, may waive both jury and trial and receive sentence without a plea of guilty valid?

Section 97, title II, of the act of 1899, providing a code of criminal procedure for the Territory of Alaska, provides:

"That if the demurrer be disallowed, the court must permit the defendant, at his election, to plead, which he must do forthwith, or at such time as the court may allow; but if he do not plead, judgment must be given against him."

January 8, 1912, petitioner demurred on the ground, among others, that more than one crime was charged in the indictment (Tr., 143). On the same day, without argument, the demurrer was overruled (Tr., 143), and petitioner entered a plea of not guilty and put himself upon the country (Tr., 144).

May 18, 1912, upon leave of court, petitioner withdrew his plea of not guilty and resubmitted his demurrer, which was again overruled (Tr., 163).

May 20 petitioner filed in the trial court his notice of election, signed by himself, to stand on his demurrer, in this connection saying:

"The defendant, C. M. Summers, now gives his notice of election to stand upon the said demurrer and not further plead and to take advantage of the provisions of sec. 97 of the Alaska criminal code of procedure, and to submit to the judgment thereunder and forthwith take his appeal to the Circuit Court of Appeals for the Ninth Circuit."

On the same day respondent filed its written objection to petitioner's standing on his demurrer on the ground that

section 97 did not apply, but that the case was governed by sections 1026 and 1032, R. S.

May 21 the court made and filed its written order wherein, after reciting the conduct of petitioner in the premises and the objection of respondent

"to the entry of judgment until the case has been submitted to a jury for trial and a verdict rendered herein,"

it was further said:

"The defendant, C. M. Summers, *may waive trial by jury* if he so elects and have judgment entered against him pursuant to the provisions of sec. 97, part two, of the Alaska Penal Code" (Tr., 181).

In view of the foregoing record, the question is squarely presented as to whether or not the foregoing act under which petitioner elected to stand and upon which judgment was entered is a valid exercise by Congress of its constitutional power.

Though the point was raised by the United States Attorney in the trial court, it is not discussed in the opinion of the presiding judge.

The Circuit Court of Appeals decided that no question of waiver of a jury trial was involved; that there was no issue to try, and therefore no occasion for a jury; that the statute was no more than an expression of the common law making it mandatory upon the court to permit a plea of *respondentaster* after demurrer overruled instead of discretionary. This is the argument here.

Says respondent, the constitutional right to a trial by jury is only such trial by jury as existed under the common law at the time of the adoption of the Constitution; then, after demurrer to an indictment for felony was overruled, the privilege to plead over was of favor and not of right, and the court, if it is so desired, could enter judgment and impose sentence without further plea. From this it is argued that there was no infraction of petitioner's constitutional rights.

Reducing, for the purpose of investigation, this argument to a simple syllogism, it stands:

The Constitution guaranteed only such rights as existed at common law.

The right to a jury trial after demurrer overruled did not exist at common law.

Therefore, the right to a jury trial after demurrer overruled was not guaranteed by the Constitution.

Even the minor premise is unsound, for whatever may have been the rule in the earlier stages of the common law, the right to plead over after demurrer overruled had, at the time of the adoption of the Constitution, become the *practical*, if not the theoretical, rule.

For, as said by Blackstone in discussing the adjudicated cases upon the subject:

"Some have held that if, on demurrer, the point of law shall be adjudged against the prisoner, he shall have judgment and execution as if convicted by verdict. But this is denied by others, who hold that in such case he shall be directed and received to plead the general issue, not guilty, after a demurrer determined against him; which appears the more reasonable, because it is clear that if the prisoner freely discovers the fact in court, and refers it to the opinion of the court, whether it be felony or no; and upon the fact thus shown it appears to be felony, the court will not record the confession, but admit him afterward to plead not guilty.

"And this seems to be a case of the same nature, being for the most part a mistake in point of law, and in the conduct of his pleading; and though a man by mispleading may in some cases lose his property, yet the court will not suffer him by such niceties to lose his life."

4th Blackstone, 333.

So it may be suggested that even though judgment of guilty might be pronounced on demurrer overruled under the common law, it does not follow that such should be the

rule in this country, particularly where the demurrer is both general and special in its nature, and goes to matters which could be reached only by motion to quash or special pleas in abatement under the common-law system.

For it might be argued where the demurrer was general and predicated upon the theory that the facts alleged did not constitute a crime, this was a confession of the acts set forth, and taken in connection with a refusal to further plead, might be treated as in the nature of a plea of guilty.

But such reasoning could not apply to the case at bar where the demurrer was also special and on the ground that more than one crime was charged in the indictment; for here there is not even the semblance of confession of fact.

But conceding *arguendo* the minor premise, the major can in no event be sustained.

While it is true that in the interpretation of the Constitution the meaning of certain words, among others "crime," "trial," "jury," will be sought for in the common law of England as it then existed, with a view of ascertaining the precise sense in which the particular term was employed, it by no means follows that the meaning of these terms having been discovered, the right will exist as at common law, for most clearly the *right* will exist as provided by the Constitution itself.

The Constitution does not say the trial of all crimes, *which were triable at common law by jury*, shall be tried by jury. Its provision is

"The trial of *all* crimes, except in cases of impeachment, shall be by jury."

At common law the right of trial by wager of battle existed, and this right was recognized by the court of King's Bench as late as the first quarter of the nineteenth century, nearly fifty years after the adoption of our Constitution, and required an act of Parliament for its elimination from the English practice. As well might it be argued, that if at

the time of the adoption of the Constitution there were certain crimes in England triable by wager of battle only, or in the Star Chamber, or the ecclesiastical court without a jury, such crimes would not be within the guarantee of the Constitution, because the right of trial by jury thereof did not exist at common law.

Whenever there is a prosecution for a crime under the laws of the United States, two things must concur: First, there must be a *trial*, and, secondly, that trial must be by *jury*. If there be pronouncement of judgment on the verdict of a jury *without trial* or judgment with trial, but *without the verdict of a jury*, the judgment contravenes the plain mandate of the Constitution. Both must concur—the trial and the jury. *In the case at bar there was neither.*

That at common law there might be a judgment of conviction on demurrer overruled proves nothing, for the most that could be said of this procedure would be that it was a trial, and even conceding, for the purpose of argument, that it was in *fact a trial*, no one will contend that it was a trial by jury.

When it is said that under the Constitution one is entitled to a trial by jury in such cases *only* as he was so entitled under the common law of England, the statement is entirely too broad.

Yet it is contended:

“The right to a trial by jury is the right as it existed at common law.”

But the proposition is not, and was not intended to be, sustained by the authorities cited. It is true that in

Callan vs. Wilson, 127 U. S., 540,

the court said (p. 549):

“In our opinion the provision is to be interpreted in the light of the principles which at common law determine whether the accused, *in a given class of cases*, was entitled to be tried by jury.”

But this language was used in determining the definition of the word "*crimes*" as used in the Constitution, and such was the purpose of the language employed in

Schick vs. U. S., 195 U. S., 65,

while in

Thompson vs. Utah, 170 U. S., 343,

similar language was employed to ascertain the meaning of the term "*jury*," whether by common law it meant twelve or a less number of men.

And while it is perfectly proper, as has been pointed out, to look to the common law to ascertain the meaning of the words, nevertheless, when once the meaning of these terms has been ascertained, there is nothing left for construction.

"The trial of all crimes, except in cases of impeachment, shall be by jury."

No matter what the common law of England at the adoption of the Constitution may or may not have been, from then on the trial of *all* crimes must be as specified.

But it is argued that if there can be a judgment of conviction on a plea of guilty, so can there be under an enabling statute on a refusal to plead further after demurrer overruled.

But the fallacy of this argument is apparent, for it rests upon the assumption that a plea of guilty is the same as, and the equivalent of, a refusal to plead further upon demurrer overruled. That there is no similarity between the two cases is obvious.

In the former, there is no issue of fact to be tried. The guilt is admitted, and to impanel a jury to ascertain and pronounce that which is admitted, would be a mere useless and idle act. If, however, there is the slightest doubt as to the possibility of error in fact, the plea will not be allowed, as if defendant be under duress or of unsound mind, or the plea be tendered for the protection of some third party.

On demurrer overruled, however, particularly where the demurrer is general and also special and to the form of the indictment, no such situation exists. There is no presumption of guilt. On the contrary, the presumption is in favor of the accused. It is a presumption of fact, as well as law, and must be overcome by evidence of fact indicating guilt. The case stands exactly as if defendant were brought into court and refused to enter any plea in the first instance. *An issue of fact remains.*

There is no manner in which this remaining or resulting issue of fact can be determined, except by trial in the manner set forth in the Constitution, *i. e.*, by jury, and it is this remaining issue of fact in the one case, and its absence in the other, which distinguishes a judgment upon plea of guilty from one upon demurrer overruled. Every reason which would prevent the court from passing sentence in the one case without plea, trial or jury, applies with equal force to the other.

It is one of the great principles of our system of criminal judicature that in no event is there to be a conviction of the innocent. Such a contingency is against the theory of our civilization. The Constitutional safeguards are thrown around those accused of crime for the express purpose of shielding and protecting them, not alone from any wrongful action of Government, but also against the consequences of their *own trustfulness, inadvertence, or negligence.*

The innocent, conscious of no guilt, may prefer the submission of their cause to some judge, calculated by learning, experience, and known integrity to be more capable of a correct analysis of evidence and human motives in a complicated case of fact than any jury, *but it is just this which the Constitution sternly forbids.* As was well said in

State vs. Carman, 63 Iowa, 130:

"The innocent person unduly influenced by his consciousness of innocence and placing undue con-

fidence in his evidence, would, when charged with crime, be the one most easily induced to waive his safeguards.

So one truly innocent in fact of the crime charged might, by reason of the mass of circumstantial evidence arrayed against him, the local prejudice of the community in the place at which a trial was forced upon him, the expense incident upon a defense upon the merits, lack of preparation, or the stress of a multitude of other causes, deem it the part of wisdom to rest his case upon some legal question involved in the form of indictment or the manner in which it had been procured. Such a course, it is believed, *is equally forbidden by the Constitution.*

In view of the foregoing considerations, respondent's contention cannot be sustained by the authorities cited and relied upon. In

West vs. Gammon,

the sole point was whether or not a judgment could be pronounced on a plea of guilty. In

United States vs. Quinn, 8 Blatch., 48,

it is true the judgment was entered upon demurrer overruled, but the question of the propriety of this practice, to say nothing of its legality, was not suggested or considered.

The fact that Congress shortly thereafter prohibited such conduct in the future proves nothing, for many of the most mandatory provisions of the Constitution are in terms re-embodied in statutory enactments.

Hallinger vs. Davis, 146 U. S., 319,

held merely that, the *Constitution of the State permitting*, the Legislature might enact:

"But if such person shall be convicted on a confession in open court, the court shall proceed by

examination and witnesses, to determine the degree of the crime and to give sentence accordingly.

The case is hardly authority to the point that under the *Federal Constitution* there can be a pronouncement of guilty without any plea thereof, and with *no examination* to determine the degree of guilt, if any. In

United States vs. Lair, 195 Fed., 49,

defendant pleaded *nolo contendere*, and a sentence was imposed, but upon the express ground that such plea *was in effect and fact a plea of guilty to every essential element of the offense*. The question as to whether or not such plea was acceptable in a case of felony was not raised or discussed.

But in

Tucker vs. U. S., 196 Fed., 261,

the Circuit Court of Appeals for the Seventh Circuit, *after reviewing all the learning upon the subject*, pointed out that such plea cannot be accepted in cases of felony requiring infamous punishment to be imposed on conviction, and reversed a case where the plea had been accepted and *evidence thereafter taken without the intervention of a jury*.

It is true that in

People vs. King, 28 Calif., 271,

the statute in question was said to be constitutional, but that was under a provision of the *State Constitution*, providing:

"The right to a trial by jury shall be secured to all and remain inviolate forever."

Very different, indeed, from that which provides:

"The trial of *all crimes shall be by jury*."

Again, in the *King* case, the constitutionality of the statute was not attacked. *It was conceded by counsel*, and

the expressions of the court arose collaterally and were not at all necessary to the decision of the question before it. In

Thomas vs. State, 6 Missouri, 457,

Ross vs. State, 9 Missouri, 686,

Hirn vs. State, 1 O. St., 16,

however, the action of the trial court was reversed in entering judgment upon the demurrer overruled, though it is true the constitutional point here involved was not discussed.

That petitioner could not, under the constitutional guarantee, waive a jury must be admitted.

Callan vs. Wilson, 127 U. S., 540.

Thompson vs. Utah, 170 U. S., 343.

Rasmussen vs. U. S., 197 U. S., 516.

Schick vs. U. S., 195 U. S., 65.

In the latter case it is true this court held that a jury might be waived, but upon the ground that the offenses therein involved were *not crimes within the constitutional provision*, and it was expressly said:

"There is no public policy which forbids the waiver of a jury in the trial of *petty offenses*."

and again,

"But if there be no constitutional or statutory provision or public policy requiring a jury in the trial of *petty offenses* upon what ground can it be contended that a defendant therein may not voluntarily waive a jury?"

Neither do the other cases cited by respondent sustain its position. In

Queenan vs. Oklahoma, 190 U. S., 548,

Rodriguez vs. U. S., 198 U. S., 156,

Powers vs. U. S., 223 U. S., 303,

the question here presented was not even remotely raised or considered.

In

Diaz vs. U. S., 223 U. S., 442,

the question was as to the effect of the absence of accused during a *portion* of the trial with his *consent and at his own request*. It was held that his right to be present was a personal privilege which, *under certain circumstances*, might be waived. That this court by no means intended to intimate that he could waive all his constitutional guarantees is apparent, for the following language from

Thompson vs. Utah, *supra*,

was quoted and reaffirmed:

"That which the law makes essential in proceedings involving the deprivation of life or liberty cannot be dispensed with or affected by the *consent of the accused*."

The reason of the rule forbidding the waiver of a jury by a defendant accused of crime is that it is in effect the substitution of a different tribunal than that authorized by law. When the prosecution involves a crime, as opposed to a petty offense, *the question is one of jurisdiction*. If there is no jury, there is no jurisdiction upon the court to make any finding of guilt. *It is simply not the tribunal commanded by the imperative terms of the Constitution*. In

Cansamie vs. People, 18 N. Y., 128,

it was said:

"The trial must be by a tribunal and in the mode in which the Constitution and laws provide without any essential change. The public office, prosecuting for the people, has no authority to consent to such a change, *nor has the defendant*."

"If a deficiency of one juror might be waived, there appears to be no good reason why a deficiency of

eleven might not be, and it is difficult to say why, upon the same principle, the entire panel might not be dispensed with and the trial committed to the court."

In

State vs. Mansfield, 41 Missouri, 470,

it was said:

"His right to be tried by a jury of twelve men is not a mere privilege; it is a positive requirement of the law. He can unquestionably waive many of his legal rights or privileges, he may agree to certain facts and dispense with formal proofs, he may consent to the introduction of evidence not strictly legal or forbidden, or forbear to interpose challenges to the jurors, *but he has no power to consent to the creation of a new tribunal unknown to the law to try his offense.*"

Many other cases might be cited to the same effect. It is believed the proposition is so firmly established in principle and reason as to render this unnecessary.

But it is contended that there is *no question of waiver* of jury involved in this case. Such was the theory upon which the petition for rehearing was denied by the Circuit Court of Appeals.

But this position is not sustained by the record, for the trial court expressly said:

"The defendant may waive trial by jury if he so elects" (Tr., 181),

and, as admitted in respondent's brief (p. 6), it was upon the supposed authority of

Diaz vs. U. S., supra,

that this ruling was made. Thus the trial court inferred that the question of trial by jury was a matter of personal privilege similar to the right to be present during the trial, as involved in the *Diaz* case.

But irrespective of the record, though upon this point it is conclusive, can it be denied that what transpired *was in substance and in fact*, if not in form, a waiver of examination of any facts indicating his guilt or innocence, and *thus a waiver of both trial and jury?*

In criminal phraseology the term "trial" means proceedings in open court after the pleadings are finished and the case is otherwise ready; down to and including the pronouncement of judgment.

If, now, it be agreed that, the trial being once begun, defendant could not by any process, *either express or implied*, waive a jury and thus confer a *forbidden jurisdiction* upon the court, how can it be said that he could do so before the trial started? Surely the greater includes the less, and a prohibition against the waiver of a jury is not avoided by waiver of *both trial and jury*.

Should the decision in the case at bar be affirmed, it will stand authority to the point that there is at least one class of cases in which there may be pronounced judgment of conviction *without plea of guilty, without examination of questions of fact, and without the intervention of a jury*. This doctrine will be pressed to the utmost limits of all its logical sequences. Will future courts in the shifting sands of governmental and political life have the firmness in hard cases of the clearest and most shocking guilt to resist its further extension to cases where a jury has been waived by *express* agreement of the parties after the trial has begun, and from there to waiver by *implication*?

As was well said in

Hill vs. People, 10 Mich., 351:

"Let it once be settled that a defendant may thus waive this constitutional right, and no one can see the extent of the evils which might follow, but the whole judicial history of the past must admonish us that very serious evils should be apprehended and that every step in that direction would tend to increase the danger. One act of neglect might be

recognized as a waiver in one case, and another in another, until the constitutional safeguards might be substantially *frittered away*. The only safe course is to meet the danger *in limine* and *prevent the first step in the wrong direction*.

"It is the duty of the courts to see that the constitutional rights of a defendant in a criminal case shall not be forfeited, *however negligent he may be in raising the objection*."

It is most earnestly urged that neither in view of the history of the past nor in the light of the possibilities of the future should the door be opened. The guilt or innocence of petitioner will be of small moment to posterity, but any modification of the great principle herein involved may be attendant with the gravest consequences.

Speaking of summary proceedings authorized by certain acts of Parliament in particular cases, Mr. Blackstone said:

"And however convenient this may appear at first (as doubtless all arbitrary powers well executed are the most convenient), yet let it be again remembered that delays and *little inconveniences* in the forms of justice are the price that all free nations must pay for their liberty in more substantial matters * * * and that, though begun in trifles, the precedent may be gradually increased to the utter disuse of juries in questions of the most momentous concern." 4 *Blackstone*, 350.

The aggressions of government are sometimes insidious. It is step by step through the years that the ground is lost or gained. A hard case arises, and the courts are pressed to so modify or extend certain principles, which ought to be unchanging, as to cover that particular controversy. Thus in

* *Crane vs. U. S.*, 162 U. S., 625,

the record disclosed the appearance of the prosecuting attorney and the accused, in person and by his attorney, an

order by the court that a jury come to try the issue joined, the selection of the jurors, the swearing of the jury, the trial, the verdict and the judgment in accordance therewith. Only the *formal arraignment* of defendant did not appear, and this court was urged to supply that vital omission either by *presumption* that it was in fact made or by holding that the arraignment was a mere *matter of form* which affected no substantial right of the accused. If this court had yielded to the persuasive argument in that case, the doctrine soon would have been again pressed, to other matters, just as it is now sought to extend *just a little further* the doctrine announced in the "*Schick*" and "*Diaz*" cases.

Finally, it is submitted that here is a case wherein from aught that appears of record petitioner *may* be innocent.

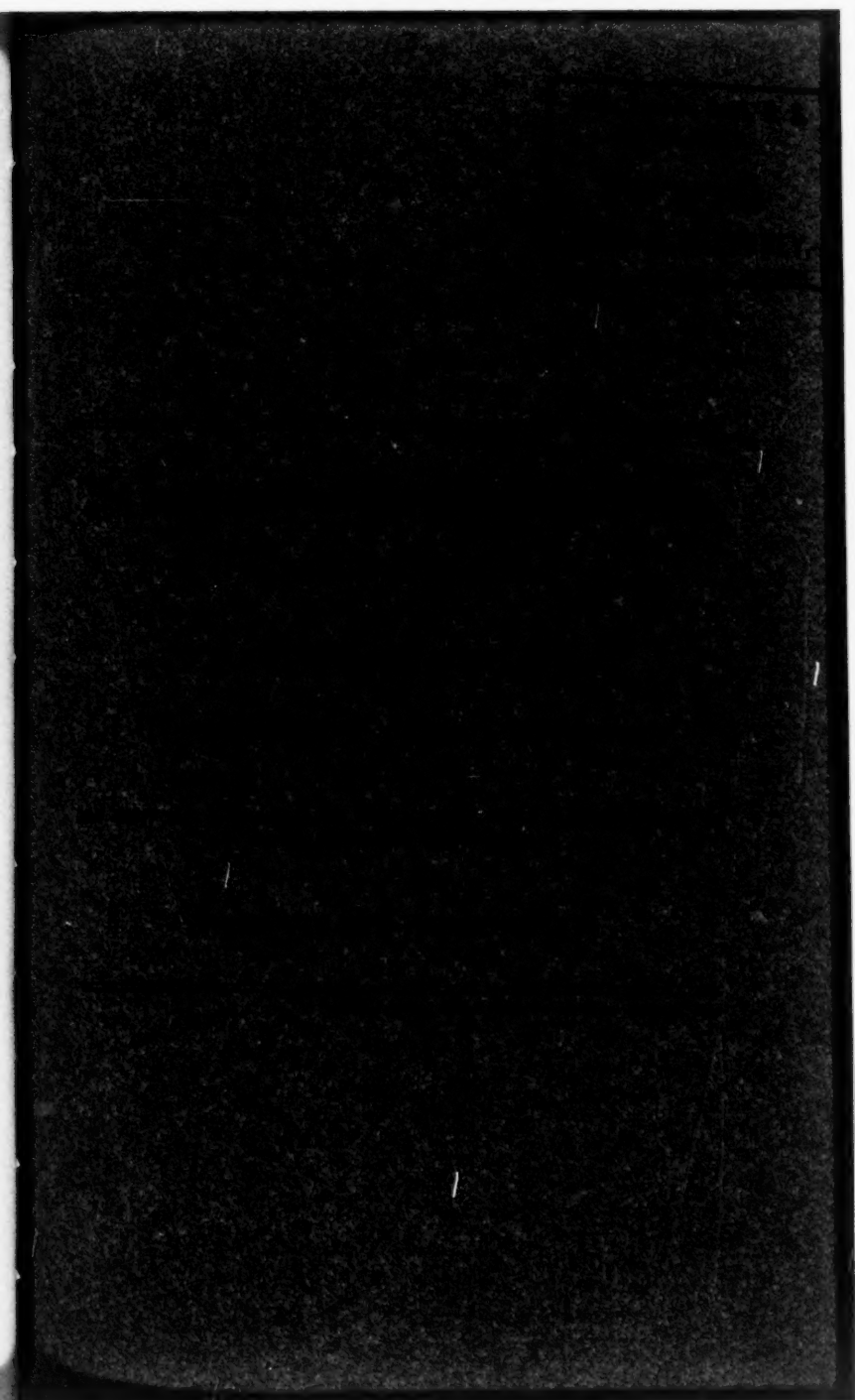
He relied upon the judgment of his counsel as to a matter of practice without ever having confessed his guilt, but, on the contrary, *having denied it*, and with no investigation as to the fact thereof he stands under sentence to a term of five years in the penitentiary, not necessarily because in the slightest degree *guilty as charged*, but solely through an error of *judgment on the part of his counsel* as to a matter of law.

Such situation is conceived to be repugnant to the fundamental principles of the administration of criminal justice, and foreign to the genius of our Government.

It is respectfully submitted that for the reasons hereinbefore set forth, the judgment herein complained of should be reversed.

Very respectfully,

ALDIS B. BROWNE,
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Attorneys for C. M. Summers.



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In the Supreme Court of the United States.

OCTOBER TERM, 1913.

| | |
|---------------------------------------|------------|
| C. M. SUMMERS, PETITIONER, | } No. 502. |
| v. | |
| UNITED STATES OF AMERICA, RESPONDENT. | |

BRIEF FOR THE UNITED STATES.

STATEMENT OF THE CASE.

This writ of certiorari was granted to review the judgment of the Court of Appeals for the Ninth Circuit affirming a sentence of the District Court for Alaska of five years' imprisonment for violation of section 5209, Revised Statutes, a part of the national banking law. The sentence was entered on overruling the demurrer to the indictment, petitioner declining to plead over, but electing to stand on his demurrer.

Petitioner was president of a national bank at Juneau. As frequently happens when a bank officer misappropriates funds, it became necessary to make false entries in the books of the bank as well as in its reports to the comptroller. According to the indictment petitioner abstracted some \$33,000 of the bank's

funds (Rec. 129) and the false entries made to hide the abstractions covered several years.

As is usual in such prosecutions, the indictment contained many counts (56 in all), some charging false entries in the books and others in the reports to the comptroller, others charging misapplication of the bank's funds, and still others charging abstraction.

Petitioner filed a demurrer on several grounds, which he submitted without argument, and it was promptly overruled (R. 143); whereupon he pleaded not guilty.

When the case was called for trial, petitioner withdrew his plea and resubmitted his demurrer; the only point argued was misjoinder. The question depended on whether section 1024, R. S., or section 43 of the Alaska Code of Criminal Procedure governed.

Said section 1024 reads:

When there are several charges against any person for the same act or transaction, or for two or more acts or transactions connected together, or for two or more acts or transactions of the same class of crimes or offenses, which may be properly joined, instead of having several indictments the whole may be joined in one indictment in separate counts; and if two or more indictments are found in such cases, the court may order them to be consolidated.

Said section 43 provides:

That the indictment must charge but one crime, and in one form only.

The District Court held that section 43 applied only to crimes defined in the Alaska Penal Code, and that section 1024 applied to Federal offenses; and again overruled the demurrer (R. 163)

The court's opinion is attached as Appendix A to petitioner's brief in this court. An earlier opinion of the same judge on the same question in one of the so-called Transportation cases, the indictment in one of which was before this court in *United States v. Pacific & Arctic Co.* (228 U. S. 87), is annexed to this brief as Appendix I.

After moving for a continuance, petitioner on May 20 filed a formal election to stand on his demurrer and a request for sentence under section 97 of the Alaska Code of Criminal Procedure, which provided that if demurrer be disallowed, "the court must permit the defendant, at his election, to plead * * * but if he does not plead, judgment must be given against him." (30 Stat. 1295.)

To the "complete surprise" of petitioner (see his affidavit, Rec. 167), the United States attorney contended that section 97 was inapplicable, and that the case was governed by section 1026, Revised Statutes of the United States, which provides that when demurrer to an indictment is overruled, "the judgment shall be respondeat ouster; and thereupon a trial * * * or a continuance may be ordered, as justice may require."

After elaborate argument, and repeated assertions by petitioner of his right and desire to stand on his demurrer and have sentence imposed, the court ruled

that the Revised Statutes governed, but that the petitioner might waive his right to trial under section 1026, Revised Statutes, and have judgment entered on his demurrer; whereupon he solemnly elected to stand on his demurrer, and have judgment entered against him (R. 181). Thereafter, when asked whether he had anything to say why sentence should not be pronounced against him, not having yet repented of his election, he replied that he had nothing to say "except that he desired to test his demurrer upon appeal" (R. 184).

On the same day petitioner having obtained a writ of error to the Court of Appeals, filed his assignment of errors, which will be examined in vain for the slightest evidence that he intended to assert that he could not lawfully stand on his demurrer.

When the case was argued in the Court of Appeals in the following October, petitioner, while apparently still confident that his demurrer would be held good—so confident in fact that he devoted 74 pages, or practically all of a lengthy brief to expounding his argument—suggested, but so delicately as not to weaken his argument on his original proposition, that the effect of the sentence imposed at his urgent solicitation was to deprive him of his right to trial by jury, a right which he could not waive. The point was however fully discussed in the oral argument and in the motion for rehearing.

But after the affirmance by the Court of Appeals of his sentence, this deprivation of a jury trial has be-

come so important that his arguments on it fill a large part of his several briefs filed in this court.

By act of August 24, 1912 (37 Stat., 512), a legislature was established for the Territory of Alaska, and this legislature, meeting in March, 1913, adopted on April 26, 1913, an act (given in full as Appendix II hereto) amending said section 43 of the Code of Criminal Procedure to correspond precisely with section 1024, Revised Statutes, so that if the demurrer were now to be heard for the first time it would necessarily be overruled.

BRIEF OF ARGUMENT.

I. Petitioner was deprived of no constitutional or statutory right to trial by jury.

A. The right to trial guaranteed by the Constitution is the right as it existed at common law; at common law judgment on overruling demurrer to an indictment was final, and accused had no right to plead over.

B. Section 1026, R. S., modifies the common law by giving petitioner the option to plead over or to accept judgment on demurrer; his election as made in this case is binding on him.

II. This court will decide this case on the present law: Section 43 Criminal Procedure Code having been amended to correspond to section 1024, R. S., the question of misjoinder is immaterial.

The amendment is not *ex post facto*.

III. The joinder was immaterial because:

(a) Petitioner received minimum sentence for one offense;

(b) Any error might have been cured had petitioner gone to trial;

(c) Any error was one of form cured by section 1025, R. S.

IV. The practice in this case is governed by section 1024, R. S., and the offenses were properly joined under that statute.

ARGUMENT.

I.

Petitioner has not been deprived of any constitutional or statutory right to trial by jury.

The action which petitioner complains of on this point was induced by his own urgent arguments, the trial court holding that petitioner was entitled to trial, but that under *Diaz v. United States*, 223 U. S., 442, 454, he might waive that right and receive sentence on his demurrer. Petitioner did not assign this ruling as error. It is difficult to believe that his counsel thought of the point and endeavored to entrap the trial court. On the contrary, the point was no doubt evolved as a last resort in the Court of Appeals. That court effectually disposed of it in its opinion on the motion for rehearing (R., 220).

A. The Constitution conferred no right to trial by jury on the pleadings in this case.

1. The right to trial by jury is the right as it existed at common law.

This proposition laid down in practically every case which has been decided under Art. III, Sec. 2, and the Sixth Amendment of the Constitution, requires no discussion for its maintenance at this late date. *Thompson v. Utah*, 170 U. S., 343, 349; *Callan v. Wilson*, 127 U. S., 540, 549; *Schick v. United States*, 195 U. S., 65, 69; *West v. Gammon* (C. C. A. 6th C.), 98 Fed., 426.

If this be the rule, it must of course work both ways; and if in a certain instance the common law did not require a jury trial there is nothing in the Constitution which demands it. *Schick v. United States*, *supra* (a written waiver of the trial by jury of a "petty offense" triable by the court at common law held not to violate the Constitution); *West v. Gammon*, *supra* (the plea of guilty, upon which at common law the court might enter judgment without trial, held not to require a jury trial under the Constitution); *United States v. Lair* (C. C. A. 8th C.), 195 Fed., 47, 52 (so held as to plea of *nolo contendere*); cf. *Hallinger v. Davis*, 146 U. S., 314, 318; *Craig v. State*, 49 Oh. St., 415; *People v. Chew Lan Ong*, 141 Cal., 550; *State v. Almy*, 67 N. H., 274 (statutes authorizing court, on plea of guilty of murder, to determine degree of offense, held not to violate 14th Amendment or State constitution).

2. At common law when a demurrer to an indictment, whether for misdemeanor or felony, was overruled, the defendant had no right to plead over, but the court entered judgment and imposed sen-

tence; however, in some cases the court in its discretion permitted the demurrer to be withdrawn and a plea to be entered.

2 Hawkins P. C. c. 31, secs. 5, 7.

2 Hale P. C., 257.

Archbold, Cr. Pl. (24th ed., 1910), 174.

Wharton, Cr. Pl. and Pr. (9th ed.), secs. 404, 405.

2 Bishop, New Cr. Proc. (2d ed.), secs. 782, 784.

Beale's Cr. Pl. & Pr., sec. 60, p. 53.

Reg. v. Hendy, 4 Cox C. C., 243.

Reg. v. Faderman, 4 Cox C. C., 359, 370.

State v. Norton, 89 Maine, 290.

State v. Passaic Co. Ag. Society, 54 N. J. L., 260.

People v. Taylor, 3 Denio, 91.

In *Reg. v. Faderman*, *supra* (decided in 1852), the question was elaborately argued, and the court, in a lengthy opinion, held that the law gave the prisoner no right to answer over, but that the judgment on demurrer was final even in the case of felonies punishable by death (381-385).

There was, therefore, in this case no issue for the jury to try, and consequently no invasion of petitioner's constitutional right to trial by jury.

B. *All statutory rights were fully accorded petitioner.*

1. Section 1026 gave the right, but did not impose the necessity, of trial by jury.

Inasmuch as no constitutional right of petitioner was infringed, the only question is whether the statute gave him any right which was denied by the courts below.

He relies strongly on section 1026, R. S., which reads:

In every case in any court of the United States where a demurrer is interposed to an indictment, or to any count or counts thereof, or to any information, and the demurrer is overruled, the judgment shall be respondeat ouster; and thereupon a trial may be ordered at the same term, or a continuance may be ordered, as justice may require.

Undoubtedly this statute gave him a *right* to a trial after his demurrer was overruled, but this trial was the last thing he wanted; he contended below that the statute gave him an option, and he finally prevailed upon the court to permit him to decline the trial and receive judgment on demurrer.

The real question then is the proper construction of section 1026.

This section is in the exact language of an act adopted May 23, 1872 (17 Stat., 158). From the authorities just cited, especially *Reg. v. Faderman*, where the harsh common-law rule was enforced in England as late as 1852, and bearing in mind Federal decisions such as *United States v. Quinn*, 8 Blatch., 48, 67 (decided in 1870), where sentence was imposed on demurrer, it is only reasonable to suppose that this statute was intended to modify the common-law rule and to give to every defendant, *as a matter of right*, an opportunity to defend on the facts after an indictment against him had been held good on demurrer. But Congress did not intend to make neces-

sary a jury trial, if a defendant preferred to receive sentence on demurrer, either because he had no defense on the facts, or was content to rely on questions of law on appeal.

The correctness of this construction appears from the discussion in the Senate:

MR. TRUMBULL. The object of the bill is simply to prevent a final judgment being entered up where a party demurs to an indictment, or some of the counts of the indictment, without allowing the case to go to trial. It was brought to the notice of the committee that there were cases where the court, if a demurrer was interposed to an indictment, entered up final judgment *without giving the party an opportunity to plead and go to trial.* (Italics ours.)

MR. WRIGHT. Entered up judgment against the defendant?

MR. TRUMBULL. Entered up judgment against the defendant. That is the whole object of the bill. (Cong. Globe, 42d Congress, 2d sess., pt. I, p. 726.)

A consideration of the language "the judgment shall be respondeat ouster" leads to the same conclusion.

Originally this judgment was entered upon sustaining plaintiff's demurrer to defendant's plea in abatement, and later was accepted as the proper judgment on any demurrer when the party was to have another opportunity to plead. But it was always understood as conferring an option which he might refuse to

accept, in which event he was said to elect to stand on his demurrer or plea, as the case might be, and final judgment went against him, not on default, but on his pleading, which might be reviewed on error. The judgment that he plead over was never understood as exerting a compulsion, but as conferring a privilege.

This appears from the forms of such judgments, both ancient and modern.

In *Walden v. Holman*, 2 Ld. Raym, 1015, the judgment was "let the defendant answer over."

In 7 Wentworth 347, the language is "that the defendant have another day to plead."

Keigwin's *Precedents of Pl.*, p. 348, shows the modern form of this judgment as concluding "with leave to the defendant to plead over as he may be advised."

Finally, such a construction would deprive a defendant of a right which he enjoyed under the common law at the adoption of the Constitution, and might prove a great hardship on him. Frequently the accused is unable to dispute the facts, though unwilling to admit them, and his only defense is that those facts do not constitute a crime. At common law he might demur and review an adverse decision by writ of error. Under petitioner's construction he is deprived of this right, but must go through a trial, perhaps at great cost of time and money both to himself and the public, before he is entitled to appeal, and this irrespective of the gravity of the crime.

Such a ruling is unnecessary to correct the evil intended to be reached by the statute.

The evil was that no defendant had the *right* to plead over after adverse decision on his demurrer; when this rule is changed by giving him the option to defend on the facts, or stand on his demurrer, the evil has been entirely corrected. A defendant may then defend both on the law or facts, or admit the facts and rely entirely on the law.

This view is in accord with the reasoning of the Court of Appeals for the Sixth Circuit in *West v. Gammon*, 98 Fed., 426, decided by Circuit Judges Lurton, Day, and Taft. There it was contended that a person could not plead guilty. The court said such a contention would require a holding that—

The Constitution not only preserved to the accused the right to enjoy a trial by jury in cases where he had seen fit to make an issue by pleading not guilty, but required him in all cases to submit the question of his guilt to a jury, whether an issue had been made in the case or not. * * *. It was the purpose of the Constitution to preserve to the accused the right, not the necessity, of a trial by jury.

So it was the purpose of the act here under consideration to give to the accused the right but not the necessity of pleading over.

The practice followed in the case was in strict accordance with the petitioner's right. The judgment overruled the demurrer without more. (R. 163.)

It was not necessary that it in terms direct the defendant to plead over, for both before and after the entry of this order he indicated that he would not plead over, making formal judgment to that effect unnecessary.

Smith v. Harris, 12 Ill., 462, 466.

Section 1032, R. S., is not applicable to this case. That section provides:

When any person indicted for any offense against the United States, whether capital or otherwise, upon his arraignment stands mute, or refuses to plead or answer thereto, it shall be the duty of the court to enter the plea of not guilty on his behalf, in the same manner as if he had pleaded not guilty thereto.

This section is taken from the judiciary act of 1790 and was designed to deal only with the situation where a person when arraigned refused to demur or enter any plea, or in other words stood mute. If this statute had covered the case of an overruled demurrer, there would have been no need for the act of 1872, now section 1026; but as already pointed out, in 1790, under the common law, the prisoner had no right to answer over after demurrer.

This construction is confirmed by the common law definitions of the terms used. In 2 Hale, P. C. 315, it is said, "if a man indicted for felony demurs to the indictment and will not otherwise answer, this is no standing mute, but if the demurrer be ruled against him, he shall have judgment of death."

This statement is quoted with approval in *Reg. v. Faderman, supra*, 4 Cox C. C. 384, where the court explains that "the demurrer was in the nature of a plea."

When the petitioner refused to avail himself of the permission to plead over given by section 1026, that section recognized that the next step, of course, must be to impose final judgment upon the demurrer, and this was done in the present case.

And the final result would be the same if the court were to be relegated either to common law or section 97 of the Alaskan Criminal Procedure Code.

The common law is legislated into Alaska by section 218 of the Penal Code of 1899 and by section 367 of the act of June 6, 1900 (31 Stat., 321).

Under the common law, as shown, a judgment is final when the party stands on his demurrer.

The same judgment would be entered if section 97 of the Alaskan Criminal Procedure Code were held applicable.

The constitutionality of such a statute is sustained in *People v. King*, 28 Calif., 265.

In *re McQuown*, 11 L. R. A., N. S., 1136, 1138, so strongly relied on by petitioner, the statute itself authorized the defendant to stand on his demurrer and receive sentence.

2. Section 1026 did not therefore go to the jurisdiction of the court; it merely invested petitioner with a right which he was free to assert, but which he might waive by his voluntary act. When he declined to proceed to trial and persuaded the court to

impose sentence on the demurrer, he was bound by his election.

Diaz v. United States, 223 U. S., 442, 454.

Schick v. United States, 195 U. S., 72.

Queenan v. United States, 190 U. S., 548, 551.

Rodriguez v. United States, 198 U. S., 156, 164.

Powers v. United States, 223 U. S., 303, 312.

II.

This court will decide the case on the present law; that law authorizes the joinder of several offenses, and the judgment below will not be reversed if upon rehearing the same order must be entered.

In the discussion of this proposition it may be assumed that section 43 of the Alaskan Code governed at the time of trial; but that section has now been amended to accord with section 1024, Revised Statutes, followed by the courts below.

By the great weight of authority an appellate court will decide a matter upon the law in force at the time of its decision; so that an error may become immaterial by reason of a change in the law, and when this happens the appellate court will not reverse particularly when upon the new law the subsequent action of the lower court must be precisely the same as it was originally.

This proposition is supported by several leading decisions of this court.

In *United States v. Schooner Peggy*, 1 Cranch 103, the vessel had been condemned in the lower court and

the case was on appeal to this court, when a treaty with France provided that property captured and not yet definitively condemned should be mutually restored. In holding that the case was to be governed in the Supreme Court by the treaty, Chief Justice Marshall said (p. 109):

It is in the general true that the province of an appellate court is only to inquire whether a judgment when rendered was erroneous or not. But if, subsequent to the judgment, and before the decision of the appellate court, a law intervenes and positively changes the rule which governs, the law must be obeyed, or its obligation denied.

In *Pugh v. McCormick*, 14 Wall. 361, a promissory note had been improperly received in evidence, because not stamped in accordance with the revenue law; pending the appeal to this court the law was changed so that the action erroneously taken with reference to this note by the collector of internal revenue might thereafter be lawfully had. In affirming the judgment, the court said (p. 373):

* * * still it may be suggested that the ruling in this case was made before the present act was passed, and it must be admitted that the suggestion is correct, but the new act shows to a demonstration that the ruling in question has become immaterial, having ceased to be prejudicial to the defendant, as the collector now possesses the power to do what he then did, that is, to affix the stamps to the note, remit the penalty, and make the proper memorandum of his doings; and it is so clear that

the plaintiff would have a right to require those acts to be done if a new trial were ordered that the court is unhesitatingly of the opinion that the judgment ought not to be reversed for that cause, as the proper stamps were affixed to the instrument and the amount of the required duty was deposited in the treasury before the note was used as evidence.

Where the case is brought here by a writ of error to a State court for reexamination the court is not inclined to reverse the judgment unless there is some substantial error to the prejudice of the complaining party, and especially not where it appears that the error has become immaterial and that the same party will be entitled to judgment if a new trial is granted.

In *Dinsmore v. Southern Express Company*, 183 U. S. 115, stockholders sued to restrain the Southern Express Company from purchasing stamps to be placed upon bills of lading under the War Revenue Act of 1898, and to restrain the State Railroad Commission from punishing the company for overcharges in making the shippers pay for the stamps; an injunction was entered in the lower court but dissolved in the Circuit Court of Appeals. Pending the submission of the case to this court, the War Revenue Act was amended by providing that it should not apply to express companies. This court held that the case must be decided upon the new law, quoting with approval the foregoing extract from the Chief Justice's opinion in *United States v. Schooner Peggy*.

This rule has been applied in a variety of cases in the State courts, involving not only matters of practice and procedure, but matters of substantive law.

In *Keller v. The State*, 12 Md. 322, Keller having been convicted of crime and sentenced, the statute was repealed pending his appeal. In reversing the decision the court said (p. 326):

The judgment in a criminal cause can not be considered as final and conclusive to every intent, notwithstanding the removal of the record to a superior court. * * * And so if the law be repealed, pending the appeal or writ of error, the judgment will be reversed, because the decision must be in accordance with the law at the time of final judgment.

In *Muskogee National Telephone Co. v. Hall*, 64 S. W. 600, the complainant, having an exclusive franchise to operate a telephone system in the Creek Nation, sought to enjoin Hall from erecting a rival plant. The injunction was denied, and pending the appeal an act of Congress entirely destroyed the exclusive character of complainant's right, and for this reason the erroneous decree was affirmed.

The State decisions following *Pugh v. McCormick*, *supra*, on questions of evidence, are numerous.

See *Hubbard v. Gilpin*, 57 Mo. 441, 444 (ancient document); *Wayne Co. v. St. Louis, etc., Railroad*, 66 Mo., 77 (auditor's certificate); *Myers v. Hollingsworth*, 26 N. J. Law, 186, 191 (where the disqualification of a witness had been removed)

In the latter case the court said (p. 191):

By the act of 1855, the disqualification of the witness on the ground of interest is removed. Hollingsworth would now be a competent witness. If a new trial is granted, the evidence upon which the verdict was rendered, and which now constitutes the ground of complaint, would be clearly admissible. Nothing, therefore, would be gained by setting aside the verdict, except additional costs and delay.

See also *Wade v. St. Mary's School*, 43 Md. 178; *Simpson v. Stoddard*, 173 Mo. 421, 476.

The same principle has been applied to matters of practice.

The case most analogous to the present is *St. Louis, etc., Railway Co. v. Berry*, 93 S. W. 1107; 42 Tex. Civ. Apps. 470. Here two railroads had been erroneously joined as defendants, but pending appeal such joinder was permitted by a new law. In affirming judgment the court said (p. 1108)—

should the judgment rendered be reversed, and the cause remanded for a new trial, on the ground that the court erred in overruling the exception under consideration, appellant will have gained nothing thereby. It is only a question of remedy involved, and under the law as it now exists the joinder of the parties and causes of action would be entirely proper. In such case it has been held that the judgment will not be reversed, although the ruling complained of was error when made.

In *Perry v. Minneapolis Street Railway Co.*, 72 N. W. 55, 69 Minn. 165, defendant demanded a

struck jury, which was denied, and pending appeal the struck jury law was repealed. The court said:

The error, if error it was, in setting aside the struck jury list, was one of those judicial errors which are remediless, and which, in contemplation of law, has done the defendant no injury; certainly none which a new trial would repair.

In *People v. Syracuse*, 128 App. Div. 702, the trial court, on defendant's motion changed the place of trial from Albany County to Onondaga County, in which Syracuse is situated, and pending the appeal the statute provided that an action against a municipal corporation should be tried in the county of its location. In affirming the order, the court said:

It would be an idle ceremony to reverse this order with leave to renew, for the reason that when it should be renewed the special term would have to give effect to the amendment, which would result in making the same order as that appealed from. (704.)

So that the question having become in reality a moot one, the court will not reverse even though of the opinion that the ruling below was erroneous; for petitioner can gain no right or advantage which was not accorded him below.

Petitioner may urge that had it not been for section 43 he would not have relied on his demurrer, but would have accepted his trial, and that this option will be denied him by an affirmance. It is true that in many of the foregoing cases a trial actually

occurred, and that here the petitioner steadfastly refused to go to trial.

But there is no distinction in principle between those cases and the present. Petitioner was offered his trial; the Government had brought witnesses from many parts of the United States and insisted upon trial; if petitioner desired a trial, he should have proceeded in the orderly course, noted his exception to the order overruling the demurrer, and included it in his bill of exceptions, if convicted. When he refused a trial and staked all on the question of pleading he ran the risk of statutes rendering that immaterial, and is in no different position than if he had gone to trial and been convicted on all counts.

As said by this court in *Royal Ins. Co. v. Miller*, 199 U. S. 353, 369, petitioner could not neglect to make full defense, and speculate on a reversal because of an error of law which in a legal sense occasioned no possible prejudice.

Nor can there be any claim that the amended statute is *ex post facto* as applied to offenses committed before its passage. It is a mere change in the rules of procedure, which dispenses with none "of the substantial protections with which the law surrounds the accused." *Cooley*, Const. Lim. (7th Ed.) 326; *Mallett v. North Carolina*, 181 U. S. 589; *Duncan v. Missouri*, 152 U. S. 377; *Hopt v. Utah*, 110 U. S. 57; *Gibson v. Mississippi*, 162 U. S. 565, 590; *Thompson v. Missouri*, 171 U. S. 380, 386. A change in existing law more strictly procedural than

this can not well be imagined. The question whether a defendant shall be tried under an indictment containing fifty-six counts or under fifty-six indictments containing one count each, is certainly not one which goes to the substantial rights of the accused. Regulations of this sort, as was said in *Hopt v. Utah*, *supra*, at 590,

relate to modes of procedure only, in which no one can be said to have a vested right, and which the State, upon grounds of public policy, may regulate at pleasure.

In several of the cases above cited the law upheld as not *ex post facto* tended much more strongly to the actual detriment of the defendant than does the statute here. In *Mallett v. North Carolina*, the plaintiff in error was indicted and tried for conspiracy, convicted, and sentenced to imprisonment. He appealed to the Superior Court, which reversed the judgment and granted a new trial. Pending this appeal, a statute was passed giving the State the right of appeal in criminal cases. Under that statute the State appealed from the judgment of the Superior Court to the State Supreme Court, which reversed the judgment of the Superior Court and remanded the cause. Upon writ of error this court held that the statute conferring upon the State the right of appeal was not *ex post facto*.

In *Hopt v. Utah*, the statute in question, enacted after the commission of the offense, made persons convicted of a felony eligible as witnesses. A witness in behalf of the prosecution, whose testimony

tended to implicate the defendant in the crime charged, was serving sentence at the time under a conviction of murder. *Held*, the statute was not *ex post facto*.

In *Hallock v. United States* (C. C. A., 8th Cir.), 185 Fed., 417, the Federal statute (sec. 808, R. S.) fixing the number of the grand jury at from 16 to 23, and requiring the concurrence of 12 grand jurors to find an indictment superseded the territorial law, calling for from 12 to 16 grand jurors and requiring 12 to concur in an indictment, when Oklahoma became a State. The offense was committed before and the indictment found after statehood. *Held*, the Federal act was not *ex post facto*—despite the fact that the indictment was found by a grand jury of 19 members, and was therefore presumably obtained by a smaller majority than would have been requisite under the territorial law.

The State courts have been equally reluctant to declare a change in criminal procedure *ex post facto* because of some possible detriment to the defendant incidental thereto.

Thus, statutes conferring on the prosecution the right of peremptory challenge (*Walston v. Com.*, 16 B. Mon. 15; *State v. Ryan*, 13 Minn. 370, 376), or increasing the number of its peremptory challenges (*State v. Hoyt*, 47 Conn. 518, 531), or reducing the number allowed the prisoner (*South v. State*, 86 Ala. 617; *Mathis v. State*, 31 Fla. 291; *Hallock v. United States*, *supra*), have been universally upheld against the constitutional objection.

In *Com v. Brown*, 121 Mass. 69, 78, the court sustained an act of legislature, passed after the commission of the offense and the impanelling of the grand jury though before the return of the indictment, which provided that said jury should be deemed the lawful grand jury of the county notwithstanding irregularities in its drawing or impanelling or in the writ of *venire facias*. See also *State v. Pell*, 140 Ia. 655. Regarding the Alaska Code amendment as curative in the present case, the direct bearing of this decision becomes obvious.

In *Marion v. State*, 20 Neb. 233, a statute making the court the judge of the law in criminal cases—a function of the jury at the date of the offense—was held not to be *ex post facto*.

The resemblance between the Nebraska case and the present one is striking. In both instances a guilty man would probably consider the old law more advantageous than the new. He might well prefer the sympathies of the jury to the learning of the court, or successive prosecutions to one trial at which his complete wrong-doing would be in evidence. An innocent defendant, however, would have nothing to lose and everything to gain by having the court decide the law of his case, or by standing trial on a multitude of charges at once instead of *seriatim*.

The purpose of the *ex post facto* provision, we submit, is not to obstruct justice by shielding the guilty from the prescribed consequences of their acts. For this reason, procedural changes which facilitate the discovery of the truth by means of a fair and impartial

trial, although they thereby make the offender's conviction more probable, are rightly regarded as valid. The Alaska Code amendment clearly belongs within this class.

It follows that if the present judgment is reversed and the cause remanded, further proceedings will be controlled by the amended statute; and under that statute, the existing indictment is valid in all respects. The only result of the reversal will therefore be that petitioner will be retried under the present indictment or under a new indictment identical in form. If the trial court erred, its error has thus become quite immaterial. Under these circumstances, this court will not reverse merely to decide the interesting but now wholly academic question of law propounded by petitioner. *Mills v. Green*, 159 U. S. 651, 653.

III.

The alleged error was immaterial.

(a) Petitioner received no greater sentence than must have been imposed on a conviction of one crime only.

The ultimate object of section 43 is to prevent the sentence of a defendant for more than one crime in one prosecution. That object has been accomplished here. The minimum sentence under section 5209 is five years; while petitioner has been sentenced on each count, the sentences run concurrently, so that he will not serve a day's imprisonment in excess of the penalty for one offense. The principle that one good count will support a judgment (*Claassen v. U. S.*, 142 U. S., 140) is applicable.

(b) Prejudice can not be shown because the error might have been cured had petitioner gone to trial.

The error might have been cured (1) by verdict of not guilty, or (2) by verdict of guilty on but one count and not guilty on the others, or (3) the prosecution might have dismissed all other counts or the court might have compelled an election.

Of course, if the petitioner had been acquitted on all counts there would have been nothing to appeal from.

So where there is a misjoinder of counts in an indictment and a conviction on one only, the error is immaterial.

Myers v. State, 92 Ind. 390, 394.

Com. v. Packard, 5 Gray, 101.

Com. v. Adams, 127 Mass. 15.

Again, the prosecuting attorney might have decided before verdict to dismiss all except one count, or he might have been compelled by the court to make his election (*Pointer v. United States*, 151 U. S. 396), in which event those counts would have been withdrawn from the indictment as absolutely as if they had been quashed.

State v. Buck, 59 Ia. 382.

Mills v. State, 52 Ind. 187.

It might be argued that petitioner would have been prejudiced by the receipt of evidence on all the counts, but evidence of all of these similar and connected crimes would have been receivable even though but one of the offenses had been charged in the indictment.

(c) The error was one of form cured by section 1025, R. S.

That section provides:

No indictment found and presented by a grand jury in any district or circuit or other court of the United States shall be deemed insufficient, nor shall the trial, judgment, or other proceeding thereon be affected by reason of any defect or imperfection in matter of form only which shall not tend to the prejudice of the defendant.

Since section 1025 applies in terms to "any district or circuit or other court of the United States," the Alaska court is such a court. Section 50 of the Alaska Procedure Code is in substance the same..

The joinder of five counts in an indictment drawn under a statute which authorized only three is not ground for demurrer, being under section 1025 a matter of form only. (*United States v. Nye* (C. C. Ohio), 4 Fed., 888; see also *United States v. Durland* (D. C. Pa.), 65 Fed., 408, 413.) Since under section 90 of the Alaskan Code the fact that "more than one crime is charged in the indictment" is made ground for demurrer (30 Stat., 1294), it might be difficult to justify the trial court's ruling on the authority of the *Nye* case. It does not follow, however, that if that ruling was erroneous the error was not merely a matter of form. In *Connors v. United States* (158 U. S., 408), at page 411, it is said that if the objection to the alleged misjoinder of offenses had been made by demurrer and overruled it would not avail on writ of error unless the substantial rights of the defendant appeared to be prejudiced thereby.

IV.

The practice in this case is governed by section 1024, Revised Statutes of the United States, and not by section 43 of the Alaska Code.

1. THE PENAL AND CRIMINAL PROCEDURE CODES OF ALASKA APPLY ONLY TO THE CRIMES THEREIN MENTIONED, AND NOT TO CRIMES DEFINED IN THE REVISED STATUTES OR OTHER GENERAL LAWS OF THE UNITED STATES.

These two codes are contained in the act of March 3, 1899 (30 Stats., 1253). Prior to its adoption, the laws defining crimes in Alaska and regulating their punishment were to be found, first, in the laws of the United States not locally inapplicable (sec. 1891, Revised Statutes), and, second, in the laws of Oregon in force in 1884 so far as they were applicable and not in conflict with the laws of the United States (act of May 17, 1884, 23 Stat., 53, secs. 7, 9; *Kie v. U. S.*, 27 Fed., 351).

As said by the late Senator Carter (Introduction to Carter's Alaska Codes, p. xvii):

Inasmuch as the laws of Oregon had not been compiled for many years prior to 1884, it was something of a task to determine what the law of that State was on the day the act of Congress was approved, and a task more difficult still to ascertain with precision how far a given law of the State was applicable to the unique Alaskan conditions and not in conflict with any law of the United States. The resulting doubts embarrassed the courts and the bar and sorely perplexed the people.

The object of the act of 1899 was to codify those Oregon statutes which Congress deemed applicable to Alaska.

The codes were mainly copied from the statutes of the State of Oregon. (Ibid., p. xviii.)

The act was not intended to define *all* crimes against the United States, including those acts which would be criminal against the United States wherever committed, or Federal offenses, but only those acts which were crimes against the United States because committed in territory under the exclusive jurisdiction of the United States. This is not denied by petitioner. He is willing to admit that Title I of the act (the Penal Code) defines only local or territorial crimes; but he contends that Title II (the Criminal Procedure Code) applies to all crimes in Alaska, both those defined in the penal code and in the general laws of the United States.

We contend, on the contrary, that the two codes are coextensive, and that the provisions of the procedure code relate only to those offenses defined in the penal code.

A brief examination of the act itself demonstrates the correctness of our position.

The two codes are contained in a single statute, the enacting clause of which is—

That the penal and criminal laws of the United States of America *and the procedure thereunder* relating to the District of Alaska shall be as follows.

Title I, in section 2, declares—

That crimes and offenses defined in this act committed within the District of Alaska shall be punished as herein provided.

In some 219 sections Title I then defines the usual offenses against the person, property, peace, justice, etc., and fixes the punishment therefor.

Title II (the Code of Criminal Procedure) declares in section 1:

That proceedings for the punishment and prevention of the *crimes defined in Title I of this act* shall be conducted in the manner herein provided.

Then follow some 481 sections in 44 chapters relating to the venue, the grand jury (ch. 4), their powers and duties (ch. 5), and so on through appeal; and an appendix contains short forms of indictments, all for local crimes.

Clearly, the two titles are interdependent, and the procedure elaborately set forth in the second relates only to the crimes defined in the first, and is that same procedure mentioned under Title I and referred to in the enacting clause.

The only section in Title II applying to offenses other than those defined in Title I is section 10, which expressly gives the grand jury the power to indict for all crimes, Federal as well as local, committed in Alaska. That section provides:

That grand juries, to inquire of the crimes designated in title one of this act, committed or triable within said district, shall be selected

and summoned, and their proceedings shall be conducted, in the matter prescribed by the laws of the United States with respect to grand juries of the United States district and circuit courts, the true intent and meaning of this section being that but one grand jury shall be summoned in each division of the court to inquire into all offenses committed or triable within said district, as well as those that are designated in title one of this act as those that are defined in other laws of the United States.

This provision strengthens our argument that the two titles are otherwise coextensive; for, had Congress intended the procedure code to apply to all offenses this express enactment would have been unnecessary.

The reason for this provision is found in the fact that the Oregon law provided for a grand jury of seven, while the Federal law prescribed from sixteen to twenty-three members, and there had been a difference of opinion among the Alaska judges as to which law applied to local offenses, some of the judges calling two grand juries—one for local and the other for Federal crimes. The purpose of this section was evidently to put that point at rest.

Petitioner relies on the last phrase of section 13. That section is:

That the grand jury have power, and it is their duty, to inquire into all crimes committed or triable within the jurisdiction of the court, and present them to the court, either by presentment or indictment, *as provided in this act.*

The jury make a "presentment" to the court of certain facts found to exist when they desire to ask the instruction of the court concerning the law arising thereon (secs. 15, 35); they present by "indictment," of course, when they have reached a conclusion on both the facts and law (sec. 29).

The phrase "as provided in this act" may apply to one or both of the preceding clauses. It may relate to the power and duty of the grand jury to *inquire* into all crimes within the jurisdiction of the court, or it may relate to their duty to *present* those crimes either by presentment or indictment. In either event the phrase is immaterial here. In the first case the jurisdiction of the grand jury to inquire is provided in section 10 of the act, and in the second case, their duty to present, and whether they shall present by presentment or by indictment, is provided in chapters 4 and 5.

In all probability the true construction of section 13 is that the concluding phrase modifies both the power and duty to inquire as well as to present.

But by no reasonable construction can it be said to modify the rules of pleading governing the form of their indictment after they have exercised their power to inquire, and have determined to present by indictment. When they have done that section 13 has been exhausted.

The contention of petitioner that section 43 and the entire procedure code apply to all crimes committed in Alaska goes too far. If the procedure code applies to *all* crimes in Alaska, by the same logic

Title I defines *all* crimes in Alaska. This is clearly not so. Not only does said section 10 of Title II recognize the contrary, but Title I contains no reference to numerous crimes defined in Title LXX of the Revised Statutes, such as crimes against the existence and operations of the Government (chs. 2, 5); against the civil rights of citizens (ch. 7); against the neutrality laws (Title LXXVII, Revised Statutes); nor to the numerous other provisions of the Revised Statutes not included in the Title Crimes, as, for example, section 5209, R. S., involved here. It will not be contended that Congress intended to abolish these offenses so far as Alaska is concerned.

2. THE GENERAL LAWS OF THE UNITED STATES NOT
LOCALLY INAPPLICABLE, INCLUDING SEC. 1024, R. S.,
ARE IN FORCE IN ALASKA.

(a) Section 1891, Revised Statutes of the United States, provides:

The Constitution and all laws of the United States which are not locally inapplicable shall have the same force and effect within all the organized Territories, and in every Territory hereafter organized as elsewhere within the United States.

Alaska became an organized Territory by the act of May 17, 1884, and said section 1891 therefore applies to it.

Interstate Commerce Com v. Humboldt S. S. Co., 224 U. S. 474, 481.

Nagle v. United States, 191 Fed. 141.

The act of May 17, 1884, established a District Court for the District of Alaska, "with the civil and criminal jurisdiction of district courts of the United States" as well as of the circuit courts (sec. 3), and declared that the general laws of Oregon then in force should be the law in said district "so far as the same may be applicable and not in conflict with the provisions of this act or the laws of the United States" (sec. 7) and that "the laws of the United States not locally inapplicable to said district and not inconsistent with the provisions of this act are hereby extended thereto" (sec. 9).

In *Kie v. United States*, 27 Fed., 351, decided in 1886 by the Circuit Court of Oregon upon an appeal from the District Court of Alaska, it was held by Judge Deady that a prosecution for homicide committed in Alaska must be under the laws of the United States, and not under the Oregon Code.

This decision has since been accepted as establishing the rule in Alaska that the laws of the United States are first to be looked to, and only when they are silent does the Oregon law apply.

This rule was inferentially recognized by this court in *Fitzpatrick v. United States*, 178 U. S., 304, where a conviction of murder under section 5339, R. S., was affirmed. The Federal law did not define murder, and it was held that the definition of the crime was to follow the Oregon law, and not the common law.

(b) *Section 1024 is locally applicable to Alaska.*

Section 1024 was originally contained in the act of February 26, 1853 (10 Stat. 161), to regulate the fees

of the clerks, marshals, and attorneys of the courts of the United States; the appropriation act of March 3, 1855 (10 Stat. 670), extended its provisions to certain territories; and this act was codified in section 823 Revised Statutes, as making the fee bill applicable to all the States and Territories.

The act of May 17, 1884, declares that the civil officers, including the attorney, marshal, and clerk shall receive the fees of office established by law as determined and allowed in respect of fees of similar offices under the laws of the United States, which fees shall be deposited in the Treasury of the United States; and that each of the officers shall be paid a certain fixed salary (Sec. 9).

The purpose of the original act of 1853 was to prevent the officers of the United States from increasing their fees by filing separate indictments when the offenses might properly be joined in one indictment. This fee bill was applied to Alaska, and therefore the same reasons exist for enforcing section 1024 in Alaska as elsewhere in the United States.

Again, section 1024 as embodied in the Revised Statutes applies to all courts of the United States.

It is placed in the judiciary title under the head of criminal procedure and among sections which in terms apply to *all* United States courts.

The character of the district court for Alaska has been many times considered by this court, and the effect of those decisions seems to be that whenever it is exercising the jurisdiction of a district court of the United States the Federal rules apply.

It is a Territorial court (*McAllister v. United States*, 141 U. S., 174), and is not a district court within sections 4, 5, and 6 of the circuit court of appeals act of March 3, 1891 (26 Stat., 826), but the supreme court of the Territory of Alaska within section 15 of that act authorizing appeals and writs of error to the circuit court of appeals (*Steamer Coquitlam v. United States*, 163 U. S., 346); but it is a district court of the United States within the meaning of section 688, Revised Statutes, authorizing this court to issue a writ of prohibition to the district courts when proceeding as courts of admiralty (*In re Cooper*, 138 U. S., 404; 143 U. S., 494) and a district court of the United States for purposes of appeal (*In re Cooper*, 143 U. S., 472, 510).

In *United States v. Pacific & Arctic Co.* (228 U. S., 87), defendants moved to dismiss a writ of error brought by the United States to review a judgment of the District Court of Alaska sustaining a demurrer to the indictment found under the Sherman and interstate commerce laws. The writ was brought under the so-called criminal appeals act of March 2, 1907 (34 Stat., 1246), which authorized a writ of error "from the district or circuit courts." This court overruled a motion to dismiss, necessarily holding that the District Court of Alaska was such a district court.

See also—

Embry v. Palmer (107 U. S., 3, 9), (the Supreme Court of the District of Columbia is a court of the United States).

Benson v. Henkel (198 U. S., 1, 13) and

Hyde v. Shine (199 U. S. 62, 75) (the District of Columbia is a district of the United States within section 1014, Revised Statutes, authorizing the removal from one district to another of persons charged with crime).

United States v. Haskins (3 Sawyer, 262) (the District Court for the Territory of Utah is a court of the United States within the same section).

Moss v. United States (23 App. Cas., D. C., 475) (the courts of the District of Columbia are United States courts within section 725, Revised Statutes, relating to contempts).

In the present case the District Court of Alaska exercised the jurisdiction of a district court of the United States. Section 1024 is a part of the machinery provided by Congress for the government of district courts, and therefore applies here.

3. A DUAL SYSTEM OF PROCEDURE DOES EXIST IN ALASKA.

To our argument it is objected that there is not a dual procedure in Alaska, and numerous decisions of this court are cited in support of the assertion.

It is not denied that the Alaska court has a dual *jurisdiction*, both Federal and Territorial (*Ex parte Crow Dog*, 109 U. S., 556, 560; sec. 10, Code Crim. Proc.).

Congress did not confer this dual jurisdiction without providing a procedure, and since the code of criminal procedure applies only to the crimes defined in the penal code, it follows that the Federal pro-

cedure necessarily governs prosecutions for Federal offenses. (*United States v. Folsom*, 38 Pac., 70.)

Before considering the cases cited by petitioner, an examination of the code of procedure relied on by him will show a dual practice in many matters.

For instance, chapter 39 authorizes the governor of the Territory to demand the surrender of fugitives from the justice of the Territory, and to surrender those demanded by the governors of the States or other Territories. But there is no provision for surrendering fugitives charged with crimes against the United States. They must be proceeded against under section 1014, R. S., which this court has held applicable to the District of Columbia (*Benson v. Henkel*, 198 U. S., 1, 13) and hence to the Territories.

Again, section 481, where the minimum penalty provided in that act is manifestly too severe, authorizes the court to impose a lesser penalty. This can not, under its very language, apply to Federal crimes.

Section 190 directs that the convict shall work out any fine at the rate of \$2 a day. Under the Federal law, if unable to pay, he may obtain his liberty after serving 30 days. (Sec. 1042, R. S.)

By section 94, a judgment sustaining demurrer to an indictment is a bar to further prosecution unless the court direct the submission of the case to another grand jury. Under section 262, a *nolle prosequi* may not be entered without the permission of the court, and, in case of felony, when entered is an absolute bar to further prosecution.

Chapter 28, in certain cases where the person injured has received satisfaction, authorizes the compromising of the crime.

If a dual practice exists as to these things there can be no objection to other differences in practice as applied to prosecutions for Federal crimes.

But the cases cited by petitioner do not support his contention.

Of course Congress may commit to the Territorial legislature entire jurisdiction over matters of procedure, or may itself establish a different procedure for the Territorial courts. We do not dispute this power of Congress; the only question here is whether Congress intended to establish the same procedure for Federal as for local crimes committed in Alaska.

An examination of the decisions in this court cited by petitioner will show that they all involved local or Territorial matters, whether civil or criminal, and that as to such local matters at least Congress had delegated to the Territorial legislature all matters of procedure.

Clinton v. Englebrecht, 13 Wall., 434 (1871), was a civil suit brought in Utah Territory to recover a penalty for the destruction of plaintiff's property; the question was whether the Federal or local statute governed the selection of jurors. This court held that by the organic act the subject was committed to the Territorial legislature, and that its laws governed.

Hornbuckle v. Toombs, 18 Wall., 648, was a civil action brought in Montana for the diversion of water.

The Territorial legislature had abolished the distinction between law and equity, and provided that there should be but one form of civil action. The court held that this subject had been committed to the legislature, at least so far as Territorial matters were concerned.

The other cases cited by petitioner but apply the principle laid down in these.

Reynolds v. United States (98 U. S., 145) and *Miles v. United States* (103 U. S., 304, 310) were prosecutions, in Utah for bigamy, a local crime. Each involved a question as to the jury, and it was held that the local statute applied.

Good v. Martin (95 U. S., 90) was a suit on a promissory note brought in Colorado. Held, that the Territorial and not the Federal statute governed as to competency of witnesses.

In *Thiede v. Utah* (159 U. S., 510, 514), a prosecution for murder, which was a local or territorial offense, it was held that section 1033, R. S., directing the service of a list of the witnesses and jurors on the defendant in a capital case, was not applicable, but that the practice was regulated by the statutes of the Territory.

These cases are in no way opposed to our argument.

1. In the first place they are all based on the fact that the organic act in each case conferred on the territorial legislature power over the subject matter, and therefore the acts of that legislature governed, at least so far as applied to local matters.

Here there was no legislature in the territory of Alaska, and no delegation to any body to adopt laws

which would supersede those of Congress. For this reason those decisions are inapplicable. The case is governed by *Page v. Burnstine* (102 U. S., 664, 668).

Here Congress passed both laws, and we have already shown that the later law was not intended to be exclusive of the earlier.

As illustrative of the difference between the ordinary territory and Alaska, it will be recalled that in *Thiede v. Utah, supra*, this court held section 1033, R. S., was not in force in that territory, while in *Bird v. United States*, 187 U. S., 118, this court treated that section as being in force in Alaska.

2. In the second place, those decisions are in local or territorial cases and none of them involved a matter of Federal jurisdiction. As said by Justice Bradley in *Hornbuckle v. Toombs*, those decisions do not apply to Federal cases. In that case the court said (p. 656):

It is true that the district courts of the Territory are, by the organic act, invested with the same jurisdiction, in all cases arising under the Constitution and laws of the United States, as is vested in the circuit and district courts of the United States; and a portion of each term is directed to be appropriated to the trial of causes arising under the said Constitution and laws. Whether, when acting in this capacity, the said courts are to be governed by any of the regulations affecting the circuit and district courts of the United States, is not now the question. * * * Cases arising under the Constitution and laws of the United States

would be composed mostly of * * * prosecutions for crimes against the United States, * * *. To avoid question and controversy as to the modes of proceeding in such cases, where not already settled by law, perhaps additional legislation would be desirable.

CONCLUSION.

It is respectfully submitted that the judgment below should be affirmed.

JESSE C. ADKINS,

Assistant Attorney General.

JOHN RUSTGARD,

United States Attorney,

First Division of Alaska.

KARL W. KIRCHWEY,

Attorney.

OCTOBER, 1913.

APPENDIX I.

IN THE UNITED STATES DISTRICT COURT FOR THE
DISTRICT OF ALASKA, DIVISION NO. ONE.

No. 836-B.

THE UNITED STATES OF AMERICA, PLAINTIFF,

vs.

THE NORTH PACIFIC WHARVES AND TRADING COMPANY,
a corporation, Pacific and Arctic Railway and Navigation
Company, a corporation, The Pacific Coast Company, a
corporation, Pacific Coast Steamship Company, a corpora-
tion, C. E. Wynn Johnson, E. E. Billingham, W. H.
Nansen, Ira Bronson, J. C. Ford, J. W. Smith, C. E.
Houston, A. L. Berdoe, and F. J. Cushing, defendants.

OPINION.

John Rustgard, Esq., United States attorney, counsel for
the Government.

Ira Bronson, Esq., *in propria persona*, Royal A. Gunnison,
Esq., Bogle, Graves, Merritt & Bogle, Shackleford & Bayless,
Farrell, Kane & Stratton, counsel for the defendants.

LYONS, District Judge:

It was agreed between counsel for the defendants and for
the Government in this case, as well as in cause No. 837-B,
*United States of America vs. Pacific and Arctic Railway and
Navigation Company*, a corporation, et al., that the questions
tendered by the motion might be argued and considered by
the court in the same manner as if raised by demurrer. The
court will therefore consider the case as if a demurrer had
been interposed, for in the opinion of the court the questions
presented should be raised by demurrer and not by motion
to quash.

The first serious question raised is: Whether or not the
indictment is vulnerable to the attack made upon it by the

demurrer on account of charging more than one crime. The defendants demurred to the indictment in this and all of the other causes wherein more than one crime is set out in the indictment, and among the grounds assigned in said demurrer is that the indictment charges more than one crime. The defendants rely on section 43 of the Code of Criminal Procedure for the District of Alaska, which provides:

That the indictment must charge but *one* crime, and in one form only; except that where the crime may be committed by use of different means the indictment may allege the means in the alternative.

The Government contends that the section of the code last cited is not applicable to the prosecution of crimes of the character charged in the indictment, but that the crimes being national in character the procedure with reference to the number of offenses or crimes which may be charged in an indictment is found in section 1024 of the Revised Statutes of the United States, which provides as follows:

When there are several charges against any person for the same act or transaction, or for two or more acts or transactions connected together, or for two or more acts or transactions of the same class of crimes or offenses, which may be properly joined, instead of having several indictments the whole may be joined in one indictment in separate counts; and if two or more indictments are found in such case the court may order them to be consolidated.

The question presented is interesting, and the determination of the same is not free from difficulty. To uphold their contention the defendants rely on the peculiar wording of certain sections of the Code of Criminal Procedure for the District of Alaska and also upon the following adjudicated cases:

Hornbuckle vs. Toombs, 85 U. S. 21.
Clinton vs. Englebrecht, 80 U. S. 20.
Good vs. Martin, 95 U. S. 90.
Reynolds vs. United States, 98 U. S. 149.
Miles vs. United States, 103 U. S. 304.
Cochran vs. United States, 147 Fed. 10.
Jackson vs. United States, 102 Fed. 473.
Thiede vs. United States, 159 U. S. 510.
United States vs. Haskell, 169 Fed. 449.
Fitzpatrick vs. United States, 178 U. S. 304.
Welby vs. United States, 76 Pac. 122.

It will be observed, after a careful consideration of the case cited, that *Clinton vs. Englebrecht* and *Hornbuckle vs. Toombs, supra*, are the leading cases cited by the defendants announcing the doctrine that the various Territories created by Congress under the Constitution and to whom Congress has delegated the power to legislate for themselves have been empowered under the organic acts creating them to legislate on all matters of local concern not inconsistent with the Constitution of the United States and the organic acts creating such Territories. It will also be observed that all the organic acts creating the Territories and empowering them to elect local legislatures to legislate for said Territories contain substantially the same provision as that conferring legislative authority on the Territory of Utah, which is quoted in *Clinton vs. Englebrecht*, 80 U. S., on page 444, as follows:

The legislative power of said territory shall extend to all rightful subjects of legislation, consistent with the Constitution of the United States, and the provisions of this act.

It is apparent from such legislation that Congress intended that the legislatures of the various Territories should be vested with full power to legislate not only concerning legal procedure, both criminal and civil, but also to enact any substantive legislation not inconsistent with the Constitution of the United States and the acts of Congress creating such Territories. The Supreme Court of the United States in the cases of *Clinton vs. Englebrecht* and *Hornbuckle vs. Toombs, supra*, holds that the power granted to the legislatures to legislate for the Territories, and the approval of their legislation by Congress, indicates that it was the intention of Congress to lodge in the local legislatures of the Territories power to legislate concerning all local matters and to approve such legislation when not in conflict with the Constitution of the United States or the organic acts of such Territories. It must therefore be conceded to be the settled law that in a Territory where a legislature has been provided for by act of Congress such legislature has the power to provide for the procedure to govern the trial of all causes without reference to whether or not the same are being conducted under the local laws of the Territory or under

the general laws of the United States. The Alaska cases cited by counsel which have been passed on by our Appellate Court deal with questions of procedure in the prosecution of violations of the local law. It must be admitted that Alaska is an organized Territory within the meaning of section 1891 of the Revised Statutes of the United States, which provides:

The Constitution and all laws of the United States which are not locally inapplicable shall have the same force and effect within all the organized Territories and in every Territory hereafter organized as elsewhere within the United States.

Nagle vs. United States, 191 Fed. 141.

But does it follow because Congress has seen fit to grant to the legislatures of the Territories where legislative assemblies are provided to enact a complete set of laws governing procedure in all cases that it did not intend to extend to Alaska any of the general laws of the United States providing for the procedure in Federal courts? This question must be answered after a careful consideration of the various acts of Congress relating to the organization of the District Court for the District of Alaska and laws of procedure for said District. On May 17, 1884, Congress passed an act entitled "An act providing a civil government for Alaska," 23 Stat. L. 24, c. 53. Section 3 of that act provides, among other things:

That there shall be, and hereby is, established a district court for said district, with the civil and criminal jurisdiction of District Courts of the United States, and the civil and criminal jurisdiction of District Courts of the United States exercising the jurisdiction of circuit courts, and such other jurisdiction, not inconsistent with this act, as may be established by law.

On June 6, 1900, Congress passed another act entitled "An act making further provision for a civil government for Alaska, and for other purposes." 31 Stat. L. 321, c. 786. The last-mentioned act includes a Political Code, a Code of Civil Procedure, and a Civil Code for the District of Alaska. Section 4 of said Political Code, found on page 132 of Carter's Annotated Alaska Codes, provides, among other things:

There is hereby established a district court for the district, which shall be a court of general jurisdiction

in civil, criminal, equity, and admiralty causes; and three district judges shall be appointed for the district, who shall, during their terms of office, reside in the divisions of the district to which they may be respectively assigned by the President.

On March 3, 1909, Congress passed an additional act, entitled "An act to amend section 86 of an act to provide a government for the Territory of Hawaii; to provide for additional judges; and for other purposes," 35 Stat. L. 838, c. 269. Section 4 of the last-mentioned act provides, among other things:

That there is hereby established a district court for the District of Alaska with the jurisdiction of Circuit and District Courts of the United States and with general jurisdiction in civil, criminal, equity, and admiralty causes.

By the act of May 17, 1884, *supra*, the District Court of Alaska is granted dual jurisdiction; that is, the jurisdiction of an ordinary court of record to hear, try, and determine all causes, both civil and criminal, of a local nature, and also the same jurisdiction as a district court of the United States as well as the jurisdiction of a district court of the United States exercising the jurisdiction of a circuit court of the United States. The act of June 6, 1900, *supra*, limited the jurisdiction of the District Court for the District of Alaska to the trial of local causes. *United States vs. Newth*, 149 Fed. 302. But the act of March 3, 1909, *supra*, again conferred such dual jurisdiction upon the District Court for the District of Alaska which was granted to it by the original organic act of May 17, 1884, *supra*. It is obvious, therefore, that from May 17, 1884, until June 6, 1900, the District Court for the District of Alaska was empowered to exercise dual jurisdiction. From June 6, 1900, until March 3, 1909, the jurisdiction of the District Court for the District of Alaska was confined to matters of local concern. But by the passage of the act of Congress of March 3, 1909, the District Court for the District of Alaska was again clothed with dual jurisdiction. It is manifest, therefore, that the District Court for the District of Alaska has now jurisdiction of the violations of all local laws of the District of Alaska as well as the violations of all national laws applicable to the District of Alaska when the same are committed within the Territorial limits of the District or on the high seas.

Section 7 of the act of May 17, 1884, *supra*, provides:

That the general laws of the State of Oregon now in force are hereby declared to be the law in said district, so far as the same may be applicable and not in conflict with the provisions of this act or the laws of the United States.

On March 3, 1899, Congress passed an act entitled "An act to define and punish crimes in the District of Alaska and to provide a Code of Criminal Procedure for said district." 30 Stat. L., 1253. The last-mentioned act contains a Penal Code and a Code of Criminal Procedure. Sections 1, 10, and 13 of the Code of Criminal Procedure, found on pages 45, 46, and 47 of Carter's Annotated Alaska Codes, provide:

SECTION 1. That proceedings for the punishment and prevention of the crimes defined in Title I of this act shall be conducted in the manner herein provided.

SECTION 10. That grand juries, to inquire of the crimes designated in Title One of this act, committed or triable within said District, shall be selected and summoned, and their proceedings shall be conducted, in the manner prescribed by the laws of the United States with respect to grand juries of the United States District and Circuit Courts, the true intent and meaning of this section being that but one grand jury shall be summoned in each division of the court to inquire into all offenses committed or triable within said district, as well those that are designated in Title One of this act as those that are defined in other laws of the United States.

SECTION 13. That the grand jury have power, and it is their duty, to inquire into all crimes committed or triable within the jurisdiction of the court and present them to the court, either by presentment or indictment, as provided in this act.

The determination, therefore, of the question now under consideration may be solved by a correct interpretation of the three sections of the Code of Criminal Procedure for the District of Alaska last quoted. The defendants contend that section 13 must control, and that by section 13 it is provided that all presentments or indictments must be in accordance with such Code of Criminal Procedure, and, therefore, must be drawn in accordance with section 43, heretofore quoted, which provides that each indictment must charge but one crime and in one form only. The Govern-

ment contends that section 1 and section 10 must be construed with section 13 in such manner as to give effect to each and all of said sections. By section 1 it is provided that all crimes defined in Title I of the Penal Code for the District of Alaska must be prosecuted in the manner provided in the Code of Criminal Procedure. Applying the maxim "*Expressio unius est exclusio alterius*" to such section—that is, that express mention of anything in a statute implies the exclusion of all other things—forces the conclusion that the prosecution of all other laws not defined in Title I must be prosecuted in accordance with some other procedure. It is impossible to harmonize the letter of the language used in section 10 with section 1 or with any other part of the Code of Criminal Procedure for the District of Alaska, for section 10 provides, among other things:

That grand juries, to inquire of the crimes designated in title one of this act, committed or triable within said district, shall be selected and summoned, and their proceedings shall be conducted, in the manner prescribed by the laws of the United States with respect to grand juries of the United States District and Circuit Courts.

It is true that grand juries to inquire of the crimes defined in Title I, *supra*, are selected and summoned in the manner prescribed by the laws of the United States with respect to grand juries of the United States District and Circuit Courts, but their proceedings are not conducted in the manner prescribed by such laws, for the manner of their proceeding is completely defined and prescribed by the Code of Criminal Procedure itself. What, therefore, is the meaning of and what construction can be given to section 10, *supra*, which will cause it to harmonize with sections 1 and 13 and give effect to all such sections? It is apparent that the framers of section 10 had in mind dual procedure for the District Court for the District of Alaska in the prosecution of crimes, because the Code of Criminal Procedure prescribes a procedure which governs grand juries while they are investigating local or Territorial crimes; but section 10 provides that the grand juries shall be governed by the rules of proceedings prescribed by the laws of the United States with respect to grand juries of the United States District

and Circuit Courts. It is evident, therefore, that it is necessary, in order to arrive at a correct construction of section 10, that the court disregard its letter and give force and effect to its spirit. While its language is confusing and contradicts section 1, as well as other provisions of the Code of Criminal Procedure, when carefully considered in the light of the dual powers of the court, as well as the other sections of the Code of Criminal Procedure, it is reasonably clear that Congress intended by section 10 to provide for two methods of procedure—one to govern the trial of offenses against the general laws of the United States and the other to govern the proceedings in the prosecution of local or Territorial crimes defined in Title I of the act to define and punish crimes in the District of Alaska and to prove a Code of Criminal Procedure in said district. Section 10, therefore, should receive the construction which would be warranted if it contained the following language:

That grand juries, to inquire of the crimes designated in Title One of this act, committed or triable within said district, shall be selected and summoned in the manner prescribed by the laws of the United States with respect to grand juries of the United States District and Circuit Courts; and grand juries, to inquire of crimes defined in other laws of the United States, committed or triable within said district, shall be selected and summoned and their proceedings shall be conducted in the manner prescribed by the laws of the United States with respect to grand juries of the United States District and Circuit Courts; the true intent and meaning of this section being that but one grand jury shall be summoned in each division of the court to inquire into all offenses committed or triable within said district, as well those that are designated in Title One of this act as those that are defined in other laws of the United States.

Such a construction gives effect to the entire section, reconciles it with all other parts of the Code of Criminal Procedure, and harmonizes with all other congressional legislation regarding the organization of the District Court for the District of Alaska, its jurisdiction and procedure.

Closely allied to the doctrine of the equitable construction of statutes, and in pursuance of the general object of enforcing the intention of the legislature, is the rule that the spirit of reason of the law will prevail

over its letter. Especially is this rule applicable where the literal meaning is absurd, or, if given effect, would work injustice, or where the provision was inserted through inadvertence. Words may accordingly be rejected and others substituted, even though the effect is to make portions of the statute entirely inoperative. So the meaning of general terms may be restrained by the spirit or reason of the statute, and general language may be construed to admit implied exceptions.

36 Cyc. 1108 and 1109, and cases cited; *Holy Trinity Church v. United States*, 143 U. S. 457; *Interstate Drainage & Investment Company v. Board of Commissioners*, 158 Federal, 270.

In the opinion of the last mentioned case, on page 273, the court used the following language:

The essential object of judicial construction of a statute is to discover the legislative mind in enacting it. The first step in the analysis is to perceive from the face of the whole act what was the underlying purpose. The intention of a legislative act may often be gathered from a view of the whole and every part of a statute taken and compared together. When the true intention is accurately ascertained, it will always prevail over the literal sense of the terms. The occasion and necessity of the law, the mischief felt, and the object and remedy in view are to be considered. When the expression in a statute is special or particular, but the reason general, the special shall be deemed general, and the reason and intention of the lawgiver will control the strict letter of the law when the latter would lead to palpable injustice, contradiction, and absurdity.

See, also, *Wisconsin Industrial School for Girls vs. Clark County*, 79 N. W. 422; *State vs. Railroad Commission*, 117 N. W. Rep. 846, wherein the court, among other things, said:

The actual judicially determined legislative intent must always govern if expressed at all so as to be discernible by the searchlights which the court possesses. They permit of looking at a written law as a whole, to the subject with which it deals, to the reason and spirit thereof, to give words a broad or narrow construction, going either way to the limits of their reasonable scope, to supply omitted words which are clearly in place by implication, to change one word for another in case of the wrong one being

clearly used, and so read out of the enactment the real intent, even though it may be contrary to the letter thereof. * * * One of the most familiar and safe canons of construction may be stated thus: For the purpose of clearing up obscurities in a law it should be read with reference to the leading idea thereof—such idea being regarded as such limitation upon particular words or clauses and expansion of others within the scope thereof, in connection with that of words clearly implied—and be thus, if reasonably practicable, brought into harmony with such idea.

Unless section 10 is construed so as to limit the following language:

That their proceedings shall be conducted in the manner prescribed by the laws of the United States with respect to grand juries of the United States District and Circuit Courts.

In its application to the rules of procedure that govern the grand jury while investigating violations of the general laws of the United States, it is meaningless, and contradicts section 1 as well as all other provisions of the Code of Criminal Procedure, for it isn't true that grand juries when investigating crimes defined in Title I, *supra*, follow the procedure governing grand juries of United States courts; but do follow the procedure prescribed by the Code of Criminal Procedure.

We must next consider the true intent and meaning of section 13, bearing in mind that section 10 provides that grand juries inquiring of crimes not defined in Title I, *supra*, shall be governed by the procedure followed by grand juries of the United States District and Circuit Courts. We find that section 13 does not in any manner contradict section 10 when so construed, for it provides:

That the grand jury have power and it is their duty to inquire into all crimes committed or triable within the jurisdiction of the court and present them to the court either by presentment or indictment, as provided in this act.

That is, if the grand jury is investigating a local crime, it shall follow the specific provisions of the Code of Criminal Procedure; if it is investigating national crimes, or infractions of laws not defined in Title I, it shall follow the procedure prescribed by the laws of the United States with

respect to grand juries of the United States District and Circuit Courts. Thus, both procedures are provided for by this act; that is, the act to define and punish crimes in the District of Alaska and to provide a Code of Criminal Procedure in said district, by giving section 10 the construction heretofore indicated. The proceedings prescribed by the laws of the United States with respect to grand juries for the United States District and Circuit Courts are a part of the Code of Criminal Procedure, and are made to apply to and govern the grand jury when investigating violations of laws other than those defined in Title I, *supra*; that is, section 10 incorporates in and makes such procedure a part of the act referred to in section 13, and when the grand jury, while inquiring into violations or infractions of the general laws of the United States, follows the Federal procedure it is proceeding according to the requirements of section 13. Nor does such a construction of the three sections in any way bring section 1 in conflict with the other two sections, for section 1 provides for the entire proceeding in the punishment of crimes defined in Title I; not only the proceedings that govern the grand jury, but also the proceedings that govern the trial of such criminal cases, while sections 10 and 13 merely deal with the proceedings of the grand jury.

Statutes *in pari materia* are those which relate to the same person or thing, or to the same class of persons or things. In the construction of a particular statute, or in the interpretation of any of its provisions, all acts relating to the same subject, or having the same general purpose, should be read in connection with it, as together constituting one law. The endeavor should be made, by tracing the history of legislation on the subject, to ascertain the uniform and consistent purpose of the legislature, or to discover how the policy of the legislature with reference to the subject-matter has been changed or modified from time to time. With this purpose in view, therefore, it is proper to consider, not only acts passed at the same session of the legislature, but also acts passed at prior and subsequent sessions, and even those which have been repealed. So far as reasonably possible, the several statutes, although seemingly in conflict with each other, should be harmonized, and force and effect given to each, as it will not

be presumed that the legislature, in the enactment of a subsequent statute, intended to repeal an earlier one, unless it has done so in express terms; nor will it be presumed that the legislature intended to leave on the statute books two contradictory enactments. Whenever a legislature has used a word in a statute in one sense and with one meaning, and subsequently uses the same word in legislating on the same subject-matter, it will be understood as using it in the same sense, unless there be something in the context or the nature of things to indicate that it intended a different meaning thereby. It must not be overlooked, however, that the rule requiring statutes *in pari materia* to be construed together is only a rule of construction to be applied as an aid in determining the meaning of a doubtful statute, and that it can not be invoked where the language of a statute is clear and unambiguous.

36 Cyc. 1147, 1148, 1149, 1150, and cases cited.

In the light of the fact that Congress has seen fit to confer on the District court for the District of Alaska the jurisdiction of a United States District Court and the consequent power to try all cases involving the violation or infraction of the national laws committed within the said district, and in the further light of section 1891 of the Revised Statutes, which extends to all Territories the Constitution and all laws of the United States that are not locally inapplicable, which section has been held to apply to Alaska (*Nagle vs. United States*, 191 Fed. 141), the court should not assume that the provisions of the general statutes of the United States governing the procedure in the Federal courts were not extended to the District of Alaska unless the legislation of Congress makes manifest its intent to extend only the substantive laws of the United States to the district and to withhold the general laws of procedure. It follows, therefore, that section 1024 of the Revised Statutes, *supra*, applies to Alaska and may be followed by the grand jury when considering infractions of laws of the United States not defined in Title I of the act to define and punish crimes within the District of Alaska and to provide a Code of Criminal Procedure for said district.

Since Congress has reserved to itself the exclusive power to legislate for Alaska, has extended to this Territory all the general laws of the United States not locally inapplicable,

and has conferred on this court the jurisdiction of a United States District Court to punish all violations of such laws, what could be its purpose in refusing to extend to this district the laws and rules of procedure of the United States District Courts, which the light of experience has proved to be so adequate and satisfactory in the prosecution of offenses of the character charged in the indictment? Section 1 of the Code of Criminal Procedure, *supra*, clearly implies the existence of other rules of procedure applicable to inquiries concerning crimes not defined in Title I of that act, and the intention of Congress to provide such other rules of procedure to govern the proceedings of the grand jury when inquiring into violations of the general laws of the United States is manifested in section 10 of the same code.

The defendants further contend that section 2 of what is commonly known as the Sherman Act does not apply to Alaska, for it provides:

* * * * *

Given in open court at Juneau, Alaska, on the 29th day of April, 1912.

THOMAS R. LYONS, *Judge*.

APPENDIX II.

CHAPTER 39, SESSION LAWS, 1913.

(H. B. No. 88.)

AN ACT To amend section 43 of Title II of the act of Congress of March 3, 1899, entitled "An act to define and punish crimes in the District of Alaska and to provide a code of criminal procedure for said District."

Be it enacted by the Legislature of the Territory of Alaska:

That section 43, of Title II, of the act of Congress approved March 3, 1899, entitled "An act to define and punish crimes in the District of Alaska and to provide a code of criminal procedure for said District," be, and is hereby, amended to read as follows:

"When there are several charges against any person for the same act or transaction, or for two or more acts or transactions connected together, or for two or more acts or transactions of the same class of crimes or offenses, which may be properly joined, instead of having several indictments the whole may be joined in one indictment in separate counts; and if two or more indictments are found in such cases, the court may order them to be consolidated."

Approved April 26, 1913.

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U. S. DEPARTMENT OF AGRICULTURE

UNITED STATES OF AMERICA

DEPARTMENT OF AGRICULTURE
BUREAU OF PLANT INDUSTRY

SECTION OF THE UNITED STATES TO ADVANCE

DEPARTMENT OF AGRICULTURE

In the Supreme Court of the United States.

OCTOBER TERM, 1912.

| | |
|--|-------------|
| C. M. SUMMERS, PETITIONER, | } No. 1045. |
| v. | |
| UNITED STATES OF AMERICA, respondent. | |

*ON WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT
COURT OF APPEALS FOR THE NINTH CIRCUIT.*

MOTION BY THE UNITED STATES TO ADVANCE.

On behalf of the United States the Attorney General moves to advance the above-entitled cause under paragraph 3 of rule 26.

Summers was indicted on January 3, 1912, in the first division of the district of Alaska, for violating the national-bank act. The indictment contained 56 counts, and the question in the case is whether more than one offense may be joined in an indictment in Alaska. Summers demurred on this ground and stood on his demurrer, whereupon sentence of five years' imprisonment was imposed, and this sentence was affirmed by the Circuit Court of Appeals.

The offenses consisted in making false entries in the books of the bank and in reports to the Comptroller of the Currency and in the abstraction and misapplication of the funds of the bank of which Summers was president.

The crimes are charged in the indictment to have occurred in the years 1909, 1910, and 1911. If the demurrer should be sustained, new indictments will be necessary, and they should be filed as quickly as possible in order to avoid the bar of the statute of limitations. For this reason an early decision is important.

Opposing counsel concur in this motion.

JAMES C. McREYNOLDS,

Attorney General.

JESSE C. ADKINS,

Assistant Attorney General.

MAY 1, 1913.



SUMMERS *v.* UNITED STATES.CERTIORARI TO THE CIRCUIT COURT OF APPEALS FOR THE
NINTH CIRCUIT.

No. 502. Argued October 22, 23, 1913.—Decided November 10, 1913.

The court will if possible avoid construing a code of procedure as establishing a dual instead of a single procedure in the prosecution of crimes committed within the same territorial jurisdiction.

The fact that the courts of Territories may have such jurisdiction of cases arising under the Constitution and laws of the United States as that vested in the circuit and district courts does not make them circuit and district courts of the United States.

The Alaskan Code of Criminal Procedure is very complete and circumstantial. It covers every step in a criminal proceeding including the form of indictment of all crimes whether specifically defined therein or not.

Prior to the amendment of 1913, § 43 of Title II of the Alaskan Code of Criminal Procedure providing that the indictment must charge but one crime and in one form only, applied to the indictment for any offense whether specifically defined in that Code or not.

It is a substantial right, and not a mere matter of procedure, to have the indictment confined to one offense and in one form only; and the amendment of 1913 to such § 43, permitting the joinder of several offenses, did not have retrospective operation.

The principle that one good count will support a judgment of conviction does not apply where the accused has the right to defend against the validity of the indictment for joining the counts and this right has not been lost by failure to plead the defect.

Fault cannot be imputed by the appellate court to the accused for standing on a right under the law as it existed at the time of the trial because the law has been so amended meanwhile as to eliminate such right.

This court, having sustained appellant's contention that the indictment was insufficient, refrains from expressing any opinion on other contentions of appellant.

202 Fed. Rep. 457, reversed.

THE facts, which involve the validity of an indictment

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Argument for the United States.

charging more than one offense, found in Alaska, are stated in the opinion.

Mr. Albert Fink, with whom *Mr. Lewis P. Shackelford*, *Mr. Aldis B. Browne*, *Mr. Alexander Britton*, *Mr. Evans Browne* and *Mr. Kurnal R. Babbitt* were on the brief, for petitioner.

Mr. Assistant Attorney General Adkins, with whom *Mr. John Rustgard*, United States Attorney and *Mr. Karl W. Kirchwey* were on the brief, for the United States:

Petitioner has not been deprived of any constitutional or statutory right to trial by jury. *Diaz v. United States*, 223 U. S. 442, 454.

The right to trial by jury is the right as it existed at common law. *Thompson v. Utah*, 170 U. S. 343, 349; *Callan v. Wilson*, 127 U. S. 540, 549; *Schick v. United States*, 195 U. S. 65, 69; *West v. Gammon*, 98 Fed. Rep. 426; *United States v. Lair*, 195 Fed. Rep. 47, 52; *Hallinger v. Davis*, 146 U. S. 314, 318; *Craig v. State*, 49 Oh. St. 415; *People v. Chew Lan Ong*, 141 California, 550; *State v. Almy*, 67 N. H. 274.

At common law when a demurrer to an indictment, whether for misdemeanor or felony, was overruled, the defendant had no right to plead over, but the court entered judgment and imposed sentence; however, in some cases the court in its discretion permitted the demurrer to be withdrawn and a plea to be entered. 2 Hawkins P. C., c. 31, §§ 5, 7; 2 Hale P. C. 257; Archbold, Cr. Pl. (24th ed., 1910), 174; Wharton, Cr. Pl. and Pr. (9th ed.), §§ 404, 405; 2 Bishop, New Cr. Proc. (2d ed.), §§ 782, 784; Beale's Cr. Pl. & Pr., § 60, p. 53; *Reg. v. Hendy*, 4 Cox C. C. 243; *Reg. v. Faderman*, 4 Cox C. C. 359, 370; *State v. Norton*, 89 Maine, 290; *State v. Passaic Co. Ag. Society*, 54 N. J. L. 260; *People v. Taylor*, 3 Denio, 91.

All statutory rights were fully accorded petitioner. Section 1026 gave the right, but did not impose the necessity,